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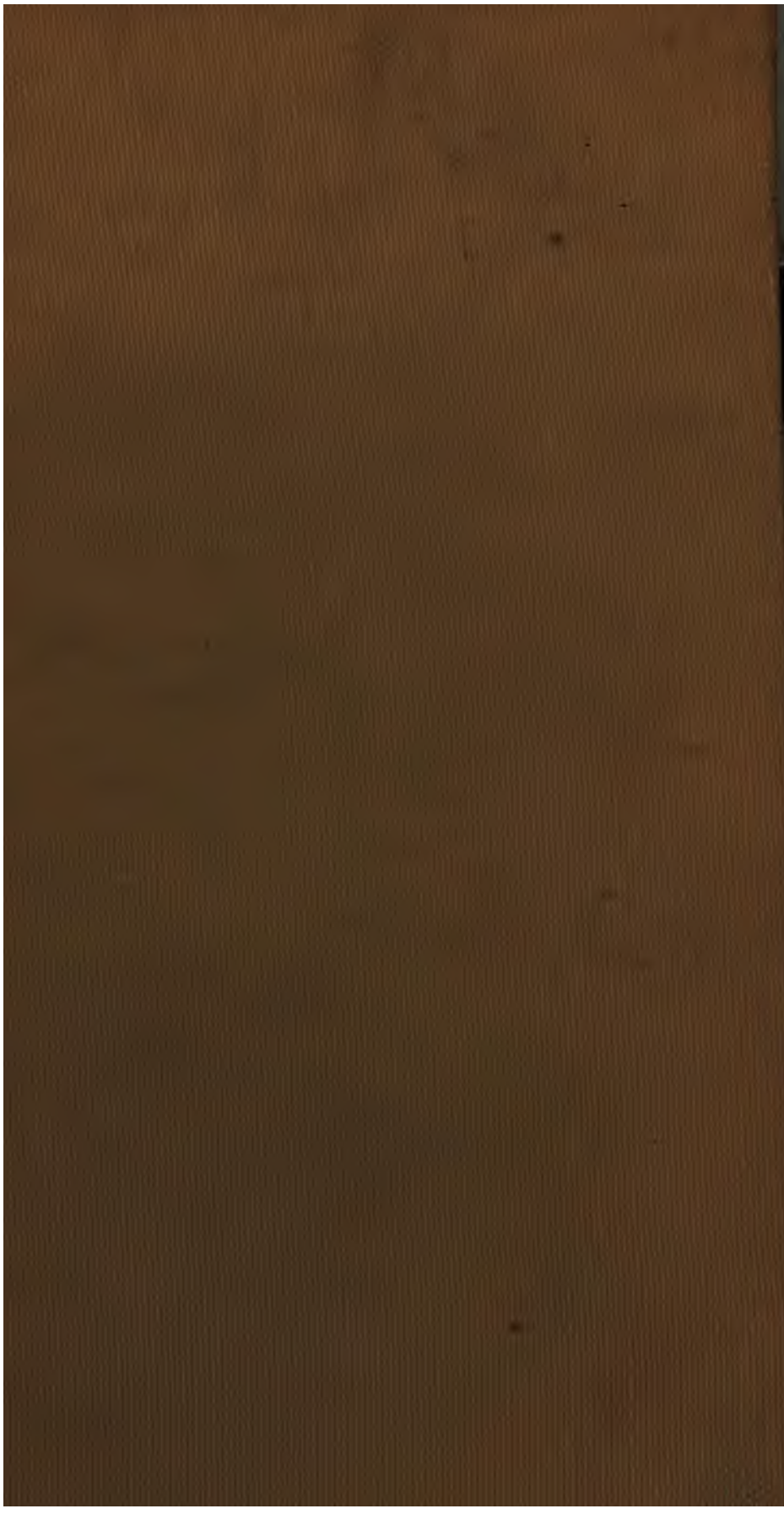

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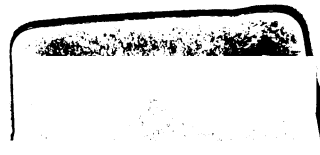

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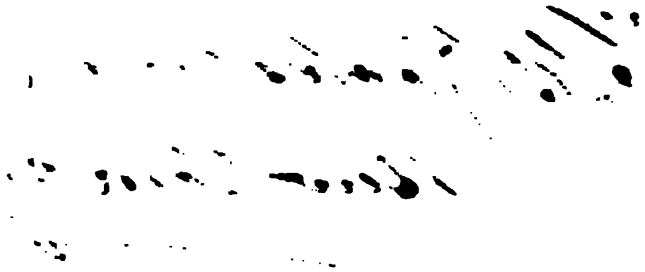
SUMMARY OF THE LAW

RELATIVE TO

PLEADING AND EVIDENCE

IN

CRIMINAL CASES.



A

SUMMARY OF THE LAW

RELATIVE TO

PLEADING AND EVIDENCE

IN

CRIMINAL CASES

WITH

PRECEDENTS OF INDICTMENTS, &c.

AND

THE EVIDENCE NECESSARY TO SUPPORT THEM.

BY JOHN FREDERICK ARCHBOLD, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

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PREFACE.

In the year 1812, I collected all the authorities upon the Pleas of the *Crown*, to be found in the text books, the books of reports, &c.: all that could elucidate the subject in Bracton, Britton, Fleta, and the Mirror; the substance of Hale, Hawkins, the third Institute, Dalton, Foster, and East; all the cases upon the subject in the Year Books, the old reports, and in the modern and recent reports; and all the statutes upon the subject: down to the period at which I made the collection. Of these materials, I framed, with infinite pains, a Digest in three volumes; one of which was actually published in the year 1813.

When I contemplated the publication above mentioned, works upon the Pleas of the Crown were extremely scarce; those of repute, upon the subject, were rarely to be had, even at most extravagant prices. But immediately upon the publication of my first volume, two other works were announced upon the same subject; one of which was published very shortly after it was announced; the other not for nearly two years afterwards. Their being announced, however, had the effect of deterring me from proceeding with my work: I thought they would amply supply the deficiency of works upon the subject; and I felt too much diffidence in my own ability, to enter into competition with the writers of them. Another, and a very elaborate work, has since been added, which has fully confirmed me in my determination not to publish the work I originally contemplated.

As the subject of Evidence in criminal cases, however, had not been treated of by any of these writers, and as some book upon the subject was extremely desirable, I thought I might select from the work I originally compiled, such part of it as related to evidence in criminal cases, and publish it, without subjecting myself to the imputation of wishing to enter into any competition with the learned writers of the works already extant upon the Pleas of the Crown. I have made this compilation; I have added to it all the cases since decided, and the statutes since enacted upon the subject; and I have compressed the whole into the smallest compass that appeared to me to be practicable, consistently with perspicuity. I have also added precedents of indictments and other criminal pleadings,—not from any idea that this part of the work was required

by the profession, there being already one or two collections of great repute upon the subject,—but merely because I found it impracticable to give the evidence in particular cases, in the simplified form I was anxious to give it, without also giving, in each case, the particular indictment or pleading the evidence was intended to support. And as I was thus obliged to give the precedents, I thought it desirable, and, indeed, necessary, also to give such a summary of the law relative to pleading in criminal cases, generally, as would enable the reader to frame an indictment, in cases where he might not be able to find a precedent.

As to the arrangement of my materials, I have endeavoured to make it simple and perspicuous. The work consists of two books. The first book, which treats of Pleading and Evidence in criminal cases generally, is divided into two parts: the first, of treating Pleading generally, namely, of indictments, informations, special pleas, demurrers, &c.; the second, treating of Evidence generally, namely, of evidence of records, of matters *quasi* of record, of private written instruments, and of parol evidence, the competency and credit of witnesses, &c. &c.

The second book, which treats of Pleading and Evidence in particular cases, is divided into four parts: the first treats of offences against the property and persons of individuals; the second treats of offences of a public nature, namely, offences against the King and his government, offences against public justice, offences against the public peace, offences against public trade, and offences against public police and economy; the third treats of conspiracies; and the fourth, of principals and accessaries.

I have now apprised the reader of what he is to expect in the following work. Trifling as it may appear, it has cost me much time and great labour. I have taken infinite pains to simplify my subject; to reject every thing redundant or irrelevant; to compress the whole into the smallest possible compass consistent with perspicuity; and to clothe it in language plain, simple, and unadorned. In fact, my sole object has been, to make this a practically useful book; I neither anticipate nor desire for it a higher commendation.

J. F. A.

6, Symonds Inn.

TABLE OF CONTENTS.

BOOK I.

Pleading and Evidence generally.

PART 1.

Pleading generally.

Ch. 1. Indictment ..... 1— 36
2. Information ..... 37— 44
3. Pleas, replications, &c..... 45— 59

PART 2.

Evidence generally.

Ch. 1. What allegations must be proved..... 60— 70
2. The manner of proving them ..... 71—112
Sect. 1. By Admissions and Confessions..... 73— 77
2. By Presumptions ..... 77— 78
3. By Written Evidence ..... 79— 92
4. By Parol Evidence ..... 92—112

BOOK II.

Pleading and Evidence in Particular Cases.

PART 1.

Offences against Individuals.

Ch. 1. Offences against the property of Individuals.....113—209
2. Offences against the persons of individuals.....210—263

PART 2.

Offences of a Public Nature.

Ch. 1. Offences against the King and his Government.....264—302
2. Offences against public justice .....303—331
3. Offences against the public peace .....332—349
4. Offences against public trade .....350—356
5. Offences against public police and economy.....357—387

PART 3.

Conspiracy .....388—394

PART 4.

Principals and Accessaries.....395—403

BOOK I.

PLEADING AND EVIDENCE, GENERALLY.

PART I.

PLEADING, GENERALLY.

CHAPTER I.

Indictment.

SECT. 1. *What, and in what cases it lies.*
2. *Form of it.*
3. *Joinder of two or more Defendants in one Indictment.*
4. *Joinder of Several offences in one Indictment.*
5. *Within what time the Bill must be preferred.*
6. *How found.*
7. *In what cases quashed.*

SECT. 1.

Indictment, what, and in what cases it lies.

*AN Indictment is a written accusation of one or more persons of a crime, preferred to, and presented upon oath, by a grand jury. [1]

It lies for all treasons and felonies, for misprisions of treason and felony, and for all misdemeanors of a public nature at common law. If a statute prohibit a matter of public grievance, or command a matter of public convenience (such as the repairing of highways, or the like), all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding. And if the statute specify a mode of proceeding different from that by indictment; then, if the matter were already an indictable offence at common law, and the statute introduced merely a different mode of prosecution and punishment, the prosecutor *has still the option of proceeding by indictment [2] at common law, or by the mode pointed out by the statute; 2 Bur. 799. 2 Salk. 460; or even if a statute prohibit, under a penalty, an act which was before lawful, and in a subsequent substantive clause ordain a mode of proceeding for the penalty different from that by indictment, the prosecutor may notwithstanding proceed by indictment upon the prohibitory clause, as for a misdemeanor at common law; or he may proceed in the manner pointed out by the statute, at his option; 2 *Hale* 171. and see 2 Str. 1146; but if the manner of proceeding for the penalty, be contained in the same clause which prohibits the act, the mode of proceeding given by the statute must be pursued, and no other. 2 *Str.* 679. Where a statute enabled the King in council to make certain orders relating to quarantine, a disobedience of these orders was holden to be a misdemeanor at common law, and indictable as such. 4 T. R. 202. So,

where a corporation were authorised by a public statute to make a towing path on the side of a river, it was holden to be a misdemeanor at common law to obstruct the corporation in the execution of the powers given them by the statute, and of course indictable. 2 Doug. 441. See Com. Dig. Indictment, D.

But an indictment will not lie for a mere private injury against an individual: as for enticing away his apprentice; 1 Salk. 380; entering his close, digging the ground, erecting a shed thereon, expelling him and keeping him out of possession; 3 Bur. 1698. 1731; pulling the thatch off a dwelling house of which he was in peaceable possession; 3 Bur. 1706. 1707; or the like: the remedy for injuries of this discription is by action only. So, an indictment will not lie for an act prohibited by a private statute, which tends merely to the damage of a particular individual; 1 Sid. 208, 209; nor will it lie for a mere breach of the bye laws or customs of a corporation. 4 T. R. 777. 3 Salk. 188. See Com. Dig. Indictment, E.

Sect. 2.

The form of an Indictment.

An Indictment consists of three parts: the commencement, the statement, and the conclusion. We shall treat of each of these, in its order.

1. *The Commencement.*

The commencement of every indictment, is thus:—"*Middlesex, to wit:—The Jurors for our Lord the King, upon their oath present that,*" &c. [so proceeding to state the offence, for which the defendant is to be prosecuted.]

[3] **Venue.*] The venue in the margin, is the only part of the commencement of an indictment, that requires attention. The general rule upon the subject is, that the venue in the margin should be the county in which the offence was committed; See 2 Hale, 163; or if the jurisdiction of the court in which the bill of indictment is to be preferred, extend only to part of the county, the venue in the margin should be co-extensive with the jurisdiction of the court; that is, it should be descriptive of that part of the county to which the jurisdiction of the court is confined, and the offence must have been committed within part of the county so described. This is the general rule of the common law; but several exceptions have been made to it by statute.

1. In Indictments for offences against the Black Act (9 G. 1. c. 22) the venue may be laid in any county, 9 G. 1. c. 22. s. 14, at the option of the prosecutor. 2 W. Bl. 723.

2. In indictments upon stat. 13 G. 3. c. 84. for felony in destroying turnpike gates, &c. the venue may be laid in any adjacent county, 13 G. 3. c. 84. s. 42, or in the county in which the offence was committed.

3. In indictments upon stat. 26 G. 2. c. 19. for plundering ships wrecked, the venue may be laid either in the county where the offence was committed, or in the next adjoining county. 26 G. 2. c. 19. s. 8.

4. In indictments for extortion, the venue may be laid in any county. 31 El. c. 5. s. 4.

5. In indictments for assaults upon officers of the excise or customs, in the execution of their duties, the venue may be laid in any county. 9 G. 2. c. 35. s. 26.

6. In indictments for offences against statutes relating to the stamp duties, the venue may be laid either in the county where the offence was committed, or in the county in which the parties accused, or any of them, shall have been apprehended. 53 G. 3. c. 108.

7. In indictments for bigamy, the venue may be laid either in the county where the offender was apprehended, 1 Jac. 1. c. 11. s. 1. or in the county in which the second marriage took place.

8. In indictments for felonies, or other offences committed in Wales, the venue may be laid in the next adjacent English county; 26 H. 8. c. 6. s. 6. 34 & 35 H. 8. c. 26 s. 84; namely, in the county of Salop, if the offence were committed in North Wales, or in the county of Hereford if the offence were committed in South Wales. See 2 M. & S. 270. and 1 Leach 125. The same provision is contained in stat. 26 G. 2. c. 19, as to the offence of plundering wrecks, if the offence be committed in Wales. s. 8. It is usual in these cases to state the venue in the margin thus: "*Salop, being the next adjoining shire within that part of the united kingdom of Great Britain and Ireland, called England (where the King's writ runneth) to the county of Anglesea in Wales, to wit.*"

*9. In indictments for high treason or misprision of treason [4] committed out of the realm, the venue may be laid in Middlesex, if the trial is to be in the court of King's Bench; or in such shire as the King shall appoint, if he appoint a commission to try the offender. 35 H. 8 c. 2. s. 1. Treasons committed in Ireland or Scotland, since the unions, and treasons committed in Wales, are not within the meaning of this act; but treasons committed in the Isles of Man, Guernsey, Jersey, Sark and Alderney, or in our foreign plantations, (which although parts of the dominions of the crown of England are not parts of the realm, see 3 Inst. 11. 111. 4 Inst. 124) are. So, in indictments for murder committed out of the King's dominions, the venue may be laid in any county the King shall think fit to appoint; 33. H. 8. c. 23. s. 1. See 1 Taunt. 26; and the same as to accessaries before the fact to such murders. 43 G. 3. c. 113. s. 6. So, in indictments for burning or destroying the King's ships, magazines, &c. out of the realm, the venue may be laid in any county within the realm. 12 G. 3. c. 24. s. 2. So, in indictments for robberies and other capital crimes committed in Newfoundland, the venue may be laid in any county in England. 10 & 11 W. 3. c. 25. s. 13.

10. Treasons, felonies, robberies, murders and confederacies, committed upon the high seas, within the jurisdiction of the Admiral, shall be inquired of, &c. in such shire of the realm as shall be limited for that purpose by the King's commission. 28 H. 8. c. 15. s. 1. and see 45 G. 3. c. 72. s. 114. Acts of hostillity by a subject of this realm against a subject at sea, under colour of a foreign commission, 11 & 12 W. 3. c. 7. s. 8. 18 G. 2. c. 30, s. 1, forcibly boarding a merchant ship, and throwing over or destroying the goods, 8 G. 1. c. 24. s. 1. trading with pirates, or fitting out a vessel for that purpose, 8 G. 1. c. 24. s. 1, master or seamen running away with the ship, goods, &c. 11 & 12 W. 3. c. 7. s. 9, burning or destroying a ship, to the prejudice of the owner and freighter, 1 Ann st. 2. c. 9. s. 4. 43 G. 3. c. 113. s. 3, and the offence of accessaries before the fact to the same, 43 G. 3. c. 113. s. 5, and maliciously burning or setting fire to a ship or vessel, or detroying or damaging her by other means: 33 G. 3. c. 67. s. 5: all these offences, if committed upon the high seas, must be enquired of in the same manner; as also the offence of accessary before or after the fact, on land or at sea, to piracy. 11 & 12 W. 3. c. 7. s. 10. It may be necessary to mention here, that rivers to the furthest point of land next the sea, creeks and arms of the sea

within the body of a county, and the sea shore between the high and low water marks when the tide is out, are not within the jurisdiction of the admiral, or within the meaning of the term "high seas" in the above statutes. The offences above mentioned are enquired of, tried and determined, before the judge of the Admiralty court and two of the judges of the common law courts, under a commission of oyer and terminer;

[5] *and in the indictment, no county is inserted in the margin as venue, but instead of it merely the words '*Admiralty of England.*'

11. In indictments for murder or manslaughter, if the stroke or poison have been given on the high seas, and the party died of the same in England, the venue may be laid in the county where the party died; or if the stroke or poison were given in England, and the party died of the same at sea or out of England, the venue may be laid in the county where the stroke or poison were given. 2 G. 2. c. 21. Where a man in a boat at a short distance from the shore, was shot by a person on shore, and died instantly, it was holden that the stroke and death were both upon the high seas, and therefore triable according to the above statute of Hen. 8, and not according to this statute of Geo. 2. Leach, 432.

12. Also in indictments for murder or manslaughter, if the stroke or poison have been given in one county, and the party died of the same in another, the venue may be laid in the county where the party died. 2 & 3 Ed. 6. c. 24. s. 2.

13. If a man commit a larceny, simple or compound, in one county, and carry the goods with him into another, he may be indicted for the simple or compound larceny in the county in which he committed it, or he may be indicted for it as for a simple larceny in the county into which, or in any of the counties through which, he brought the goods; for in contemplation of law, there is such a taking and carrying away as constitutes the offence of larceny, in every place through which the goods were carried by him. 1 Hale, 507, 2 Id. 163. 3 Inst. 113. So, if a man steal goods, money, &c. in Scotland, and carry them into England, he may be indicted for larceny in any county in which he may have the goods in his possession. 13 G. 3. c. 31. s. 4. In the case of larcenies from "stage coaches, stage waggons, stage carts, and other such carriages," the venue may be laid in any county or city through which the coach has passed. 59 G 3. c. 96. s. 1. Also, where a felony is committed on the borders of two or more counties, within five hundred yards of the boundary, the venue may be laid in either county. s. 2.

14. In indictments for conspiracies, the venue may be laid in any county in which it can be proved that an act was done by any one of the conspirators in furtherance of their common design. See 4 East, 164. in indictments for compassing the King's death, or for any of the treasons in stat. 36 G. 3. c. 7. s. 1, the venue may be laid in any county in which a sufficient overt act can be proved. R. v. Lord Preston, 4 St. tr. 410—455; and see Fost. 9. In an indictment for sending a threatening letter, the venue may be laid either in the county where the prosecutor received it, 2 East, P. C. 1125. 1120, 1 Leach, 142, or in the county from which the offender sent it. See 1 Camp. 215. 2 Id. 506. 3 Barn. & Ald. 717. So, if an act done in one county prove a nuisance to another, it seems that in an indictment for it, the venue may be laid in either county, although it seems more correct to lay it in the county in which the act was done. Where a servant who had received money for his mas-

[6] ter in the county of A. and upon returning to his master *in the county of B. denied having received it, the judges held that his being indicted for the embezzlement in the county of B. was correct, for

he could not be said to have embezzled the money until he refused to account for it. 3 B. & P. 596.

15. An accessary in one county to a felony committed in another, may be indicted in the county in which he became accessary. 2 & 3 Ed. 6. c. 24. s. 4. But in case of misdemeanors, all persons procuring, inciting, aiding, abbetting, or assisting in the commission of them, may be indicted in the county in which the misdemeanor was committed, (whether the procuring or inciting took place in that county or not,) for they are all principals. See 7 East, 65. And the same in high treason. If a person in one county procure an innocent agent to commit a felony or misdemeanor in another county, he is in that case deemed a principal in the offence, and may be indicted for having actually committed it, the venue being laid in the county where it was committed; Fost. 349; see 4 East, 164; but if the person he had procured were privy to his criminal intent, and were himself amenable for the offence, then, if the offence were a felony, the party who procured it, would be indictable merely as an accessary before the fact; if a misdemeanor, as a principal. *Vide supra.*

Caption.] The caption is no part of the indictment; it is merely the style of the court where the indictment was preferred, which is prefixed as a kind of preamble to the indictment upon the record, when the record is made up, or when it is returned to a *certiorari*. The following is a form of the caption to an indictment in a court of quarter sessions:

"*Westmorland. At the general quarter sessions of the peace, holden at Appleby, in and for the county aforesaid, the day of in the year of the reign of our Sovereign Lord George the Fourth of the united Kingdom of Great Britain and Ireland, King, Defender of the Faith, before A. B. & C. D. Esquires, and other their associates, justices of our said Lord the King, assigned to keep the peace of our said Lord the King, in the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, by the oath of*" [the grand jurors, naming them] "*good and lawful men of the county aforesaid, sworn and charged to enquire for our said Lord the King, and for the body of the county aforesaid, it is presented,*" that J. S. late of Appleby, in the county aforesaid, labourer, &c. so continuing the indictment. See 2 Hale, 166. 2 Burn's J. 799, and see the forms, 4 Went. 41. 105. 139. 150. 174. 222. 6 Went. 1. 357. 373. Cr. Cir. Com. 327.

2. *The Statement.*

In this part of the indictment, all the ingredients of the offence with which the defendant is charged, the facts, *circumstances, and intent constituting it, must be set forth with certainty and precision, without any repugnancy or inconsistency, and the defendant charged directly and positively with having committed it. [7]

It must be certain as to the party indicted.] The defendant must be described in the indictment by his christian name and surname, and by his addition. The inhabitants of a parish, however, may be indicted for not repairing a highway, or the inhabitants of a county, for not repairing a bridge, without naming any of them.

The christian name of the defendant must be such as he obtained at baptism or confirmation, see 2 Ro. Abr. 135. Co. Lit. 3, or both. 6 Mod. 115, 116. It is said that a man can have but one christian name; 2 Hale, 175; but this must be understood to mean merely that he cannot be named "John *alias* James," or the like; that is, that a second christian name cannot be given to him after an *alias dictus*; See 1 L. Raym. 562. 3 East, 111; but it is quite clear, that if a man has acquired two names at bap-

tism, or one at baptism, and another by confirmation, he may be indicted by both; and if these be misplaced, as if his name be *Richard James*, and he be named in the indictment *James Richard*, it is as much a misnomer, and may be pleaded in abatement in like manner, as if other and different names were stated. 5 T. R. 195.

The surname may be such as the defendant has usually gone by or acknowledged; and if there be a doubt which one of two names is his real surname, the second may be added in the indictment after an *alias dictus*, Bro. Misnom. 47, thus, "*Richard Wilson otherwise called Richard Layer.*"

The additions required to be given to defendants in an indictment, by stat. 1 Hen. 5. c. 5. are, the addition of their "estate, *or* degree, *or* mystery," and also the addition of the towns, *or* hamlets, *or* places, *and* counties of which they were or be, or in which they be or were conversant." These additions should be added after the first name, and not after the *alias dictus*; 2 Inst. 699. 3 Salk 20; although if an addition be given to the name after the *alias dictus*, it may be rejected as surplusage. 2 Hawk. c. 25. s. 70.

Estate and degree mean the same thing, namely, the defendant's rank in life. A duke, marquis, earl, viscount, or baron, must be named by his christian name only and his name of dignity: as "John, duke of M." 2 Inst. 666. And the same of peeresses; as, "Ann, countess of L." But this does not extend to foreign noblemen, who are entitled in this country to the addition of Esquire only, 2 Hawk. c. 23. s. 109, unless they be knights, in which case they should be named so; 2 Inst. 667; and the same as to the titles usually given to the eldest sons of dukes &c.

[8] 3 Inst. 30, 2 Inst. 667. *and see* 2 Salk. *454. The addition of baronet or knight, must be added to christian and surname. 2 Inst.665. See Cro. Car. 371.

A degree in one of the universities is a good addition; 2 Inst. 668; so is the addition of "clerk" for a clergyman. Id. "Esquire" is a good addition for the eldest sons of knights and their eldest sons in succession; for the eldest sons of peers; for the youngest sons of peers and their eldest sons in succession; for foreign noblemen; for the esquires of knights of the bath; and for esquires by virtue of their offices, such as justices of peace. 2 Inst. 667. Gentleman is a good addition; so is yeoman.

Mystery means the defendant's trade, art, or occupation: such as, merchant, mercer, tailor, parish clerk, schoolmaster, husbandman, labourer or the like. 2 Hawk. c. 23. s. 111. If a man have two trades, he may be named of either; 2 Inst. 668; but if a man who is a gentleman by birth be a tradesman, he should be named by his worthier addition of gentleman; Id. 669; in all other cases he may be indicted by his addition of degree or mystery, at the option of the prosecutor. See 8 Mod. 51, 52. 1 Str. 556. 2 Str. 816. 2 L. Raym. 1541.

The additions of degree of mystery usually given are, to peers, peeresses, knights, esquires, clergymen and gentlemen, the addition to which they are of right entitled; to other men, the addition of yeoman or labourer; or to tradesmen, &c. the addition of their mystery; to widows, the addition of widow; to single women, the addition of spinster or single woman; to married woman, usually thus, "Jane, the wife of John Wilson, late of the parish of C. in the county of B. labourer." Labourer, 2 L. Raym. 1179, or yeoman, 2 Inst. 668, is not a good addition for a woman. It is necessay to mention that the degree or mystery must be stated as that to which the defendant was entitled at the time of the indictment; *late* esquire, *late* grocer, or the like, would be bad. 2 Inst. 670.

As to the addition of place, the defendant must be described as of the

town, *or* hamlet, *or* place, *and* county of which he was or is, or in which he is or was conversant.

A town may contain two or more parishes, and yet the town in that case would be a sufficient addition; see 2 Inst. 699; but if there be two or more towns in one parish, the defendant should be named of the town and not of the parish. Id. If there be two towns of the same name in the county, but distinguished from each other by additions, as Great Dale, Little Dale, Upper Dale, Lower Dale, or the like, the defendant cannot be named of Dale only without addition; but if the towns have no addition to distinguish them, he may. 2 Hawk. c. 23. s. 121.

If the defendant reside in a borough or city which is a county of itself, the addition of that alone (as "London" for instance) will be sufficient, without naming a parish. 2 Inst. 669.

* If he reside in a hamlet out of a town, he may be described [9] as of that; if *in a hamlet* of a town, he may be described as of *either the town* or hamlet. 2 Hawk. c. 23. s. 122.

Parish is a good addition; 2 Inst. 669; but if there be two or more towns in the parish, and the defendant reside in one of them, he should be named of the town. Id.

If the defendant reside in a place known by a special name, and not within a town or hamlet, he may be named of such place; but if it be within a town or hamlet, it is safest to name him of the town or hamlet. 2 Hawk. c. 23. s. 123.

Besides being described of a town or hamlet, or parish, or place, the defendant must also be described of the county in which such town, &c. is; and if he be described of a borough or city which is a county of itself, that alone will be sufficient. 2 Inst. 669.

The defendant may be described as late of the parish of B. in the county of C.; 2 Inst. 669, 670; although we have seen it is otherwise as to additions of degree or mystery.

If his place of residence be known, he may be described of it according to the truth; but when not known, it is usual to describe him of any parish in the county where the offence was committed.

In the case of peer and peeress, the addition of degree is placed before the addition of place, as, "*John, duke of B. late of N. in the county of C.*" But in all other cases the addition of place goes first: as "J. S. late of the parish of B. in the county of S. gentleman." If you were to describe the defendant as "merchant of London," 4 Ed. 4, 10 a. or "parson of D. in the county of C," 2 Inst. 699, it would be bad, for it does not follow, from this description of him, that he resides there.

Besides the additions we have now mentioned, it may be necessary also, where a father and son are of the same name, and one of them is indicted, to add the terms "the *younger*" or "the *elder*" to his name, for the purpose of more clearly identifying him. 2 Hawk. c. 23. s. 106.

If there be no addition, 1 Sid. 247. or a wrong one, 2 Inst. 670, the defendant can take advantage of it by plea in abatement only; if he plead over, he thereby waives all objections to the indictment on that account. 2 Hawk. c. 23. s. 125. So, if there be no christian name or a wrong one, or no surname or a wrong one, the defendant can take advantage of it by plea in abatement only; if he plead over, he waives the objection. It was formerly understood that a defendant could not plead a misnomer of his surname; 2 Hawk. c. 25. s. 68. 2 Hale, 176; but it seems now to be holden otherwise. See 10 East, 83.

It must be certain as to the person against whom the offence was commit-

ted.] In indictments for offences against the persons or property of individuals, the christian and surname of *the party injured, either his real name or the name by which he is usually known, must be stated, if the party injured be known; 2 Hawk. c. 25. s. 71, 72: as, for the murder of "*John Styles*," larceny of the goods of "*John Styles*," larceny in the dwelling house of "*John Styles*," burglary in the dwelling house of "*John Styles*," and therein stealing the goods of "*John Nokes*," and the like. No addition is requisite; 2 Hale, 182; even where it appeared that the party injured had a mother of the same name, the court held that it was not necessary to distinguish her in the indictment by the addition "the younger," although it was objected that in such a case, where such an addition is not given, the presumption is that it is the parent and not the child that is intended, and some cases were cited to that effect. 3 B. & A. 579. But where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it; and it should seem, that if he be described as a knight when in fact he is a baronet, or the contrary, the variance would be fatal.

[10]

An indictment for stealing the shroud of a dead person, must state it to be the goods and chattles of the executor or administrator; 2 Hale, 181; or if there be no will or no administration, it should seem that it may be laid to be the goods of the person who defrayed the expences of the burial, or of the ordinary, if the shroud were purchased with the money of the deceased. If property be stolen out of the possession of a bailee, it may be described in the indictment as the property either of the bailor or bailee; 2 Hale, 181; as, for instance, goods intrusted to a person for safe keeping, or to a carrier to carry, cloth to a tailor to make into clothes, linen to a laundress to wash, goods pawned, and the like, may be laid to be the goods and chattles of the person to whom they are so intrusted, &c. or of the owner, at the option of the prosecutor.

Formerly where goods stolen were the property of partners, all the partners must have been named in the indictment, and correctly, otherwise the defendant would be acquitted. But now in indictments for stealing minerals, timber, iron, or other materials from mines, the property of any mining company, they may be described as the property of any one or more of the partners, and others his or their partners or adventurers, without naming the others. 56 G. 3. c. 73. And the same provision is now extended generally to indictments for "burglary, felony, grand or petit larceny, or criminal breach of trust, committed on the goods, chattels, or personal property, of what nature soever, of any partners whatsoever." 1 Geo. 4. c. 102. See further upon this subject, *post*, p. 117—119.

If, however, the name of the party injured be unknown to the prosecutor, as in the case of the murder of a stranger, or larceny from the person of a stranger who does not come forward to prosecute, or the like, he may be described in the indictment as a person unknown; 2 Hale, 181; thus, for *instance, a man may be indicted for the murder of, or for stealing the goods of, "*a certain person to the jurors unknown.*"

[11]

If at the trial it appear in evidence that the party injured is misnamed, or that the owner of the goods or house &c. is another and different person from him named as such in the indictment the variance is fatal and the defendant must be acquitted. So, if he be described as a certain person to the jurors unknown, and it appear in evidence that his name is known, the defendant will be acquitted. See 3 Camp. 264 1 Holt, 595. In an indictment for receiving stolen goods, if the principal felon be un-

known, he may be described as a certain person to the jurors unknown ; R. v. Thomas, East, P. C. 781 ; but if it appear in evidence that the principal felon is known, the receiver will be acquitted. R. v. Walker, 3 Camp. 264.

It must be certain as to time and place.] Time and place must be added to every material fact in an indictment ; 5 T. R. 607. 1 T. R. 69. Standf. 95. a. ; that is, every material fact stated in an indictment, must be alleged to have been done on a particular day, and at a particular place. As to what are material facts, it is necessary to observe that every offence consists of the commission or omission of certain acts under certain circumstances ; and each of these, being a necessary ingredient in the offence, is material, and must be stated in the indictment. An offence of omission or a mere nonfeasance, cannot indeed strictly be said to have been committed at any time or place ; and therefore in an indictment for such an offence, the allegation of time and place is in general unnecessary ; Com. Dig. Indictment, G. 2 ; yet if it be an indictable offence to omit doing an act at a particular time, or at a particular place, an indictment for it should undoubtedly shew that it was not done at that time or at that place. But in indictments for offences of commission, every act which is a necessary ingredient in the offence, must be laid with time and place, as above mentioned. Thus, if in an indictment for murder it be stated that J. S. at such a time and place, having a sword in his right hand, did strike J. N. &c. it is insufficient ; for the time and place laid relate to the having the sword, and consequently it is not said when or where the stroke was given. 2 Hale, 178. Cro. El. 738. So, that J. S. at such a time and place, made an assault upon J. N. *et eum cum gladio felonice percussit*, was holden bad, because it was not said *ad tunc et ibidem percussit*. Dy. 68, 69. Yet an indictment for a battery, where time and place were laid to the assault, but not to the battery, has been holden good ; 2 Hale, 178 ; and this distinction seems to have been established, that in felonies, *in favorem vitæ*, the greater strictness above mentioned, (namely, that time and place be laid to every material *fact,) is required ; but in indictments for misdemeanors, if [12] time and place be added to the first act, it shall be construed equally to refer to all the ensuing acts. See Cro. Jac. 41. However, in practice, time and place are added to every material fact, as well as in indictments for misdemeanors as in indictments for felony. What we have now said, relates to acts which are necessary ingredients in the offence ; for mere circumstances accompanying these acts, need not be laid with time or place, March. Pl. 127. 2 Ro. Rep. 226, unless rendered essential by the particular nature of the offence. Thus, in an indictment for bigamy, in averring that the first wife was alive at the time of the second marriage, it is not necessary to allege a place where, Stark. Pl. 62, although, from the nature of the offence, the time must necessarily be stated.

The time laid, should be the day of the month and year, upon which the act is supposed to have been committed. A day certain must be stated ; 2 Hawk. c. 25. s. 77 ; and this at present is always the day of the month, although naming it as a feast day, or " the Octave of the Holy Trinity," or the like, seems to be sufficient. Com. Dig. Indictment, G. 2. The year must also be stated, otherwise the indictment will be insufficient ; 2 Hale, 177 ; and the year of the king's reign is usually inserted ; but the year of our Lord is equally unobjectionable. It is said alleging the act to have been committed on such a day *last past*, would be sufficient, because it would be rendered certain by the caption of the Indictment ;

Com. Dig. Indictment, G. 2. Lamb, 491 ; but this perhaps is doubtful, particularly if the objection were made at the time of the trial. In no case is it necessary to state the hour at which the act was done, unless rendered essential by the statute upon which the indictment is framed. 2 Hawk, c. 25. s. 76 ; and see 3 Bur. 1434. 1 Bulst. 204. March. pl. 127. 2 Inst. 318. In burglary indeed it is usual to state it ; but alleging the offence to have been committed " *in the night*," without mentioning the hour, seems to be sufficient. So, in an indictment upon stat. 39 El. c. 15. for breaking into a house in the day time, it is usual to insert the hour ; but this is not necessary ; and if it otherwise clearly appear upon the face of the indictment, that the offence was committed in the day time, it will be sufficient.

The place (or *special venue*, as it is technically termed) must be such as in strictness the jury, who are to try the cause, should come from ; and it may here be necessary to mention that the stat. 4 & 5 Ann. c. 16. & 24 G. 2. c. 18. which direct the *venire facias* to be awarded of the body of the county, extend only to civil actions. At common law (by which indictments are still regulated in this respect) the jury, in strictness, should have come from the town, hamlet, or parish, or from the manor, castle, forest, or other known place out of a town, where the offence
[13] was committed ; and therefore every *material act mentioned in the indictment must be stated to have been committed in such a place. If a city or town contain two or more parishes, the parish must be stated ; if, on the contrary, a parish contain two or more towns, and the offence have been committed in one of the towns, the town must be stated. In London it is usual to name the ward as well as the parish ; thus, " *in the parish of Saint Mary-le-bow in the ward of Cheap ;*" but this, it seems, is not requisite. 2 Hawk. c. 23. s. 92. Nor need the hundred, in which the parish, &c. is situate, in other cases, be mentioned, Id. Also, besides the parish or place, the county (or the city, borough, or other part of the county to which the jurisdiction of the court is limited,) in which such parish or place is situated, must also be stated ; and the county, &c. so stated, must be the same as that stated as venue in the margin of the indictment. See 2 Hale, 180. Indictments for offences within the admiral's jurisdiction, see ante, p. 4.) must allege each act to have been done " *on the high sea ;*" and it is usual to add " *within the jurisdiction of the admiralty of England ;*" sometimes the place or land near which the offence was committed, is also stated ; but this is not necessary.

" Time and place are usually alleged thus : That J. S. of, &c. *on the third day of May, in the second year of the reign of our sovereign lord George the fourth, in the parish of B. in the county of C.*" or " *in the county aforesaid*," (See 3 P. Wms. 439.) referring to the county in the margin. And if all the acts constituting the offence be supposed to have been done at the same time, it is sufficient (to all but the first) to allege time and place by the words "*then and there*," referring to the time and place mentioned to the first act, without saying " *on the day and year aforesaid, at the parish aforesaid, in the county aforesaid*," or repeating the day and year, parish and county, to every act. The time and place however must be laid with certainty ; and therefore where the indictment described the defendant as late of W. and laid the offence to have been committed " in the *parish* aforesaid" (there being no parish before mentioned, W. not having been described as such), the court arrested the judgment. R. v. Matthews, 5 T. R. 162. So, where the indictment described the place as being " in the county aforesaid," where there were two

different counties before mentioned, it was holden bad, although one of the counties was mentioned in the defendant's addition merely. 1 Ro. Rep. 223. And the same, if it laid the offence to have been done on the day and year aforesaid, and there were no day and year, or two different days, &c. before stated. So, if it lay it to have been done on a day certain, "and on divers other days and times," it will be bad for uncertainty, see 6 East, 395, unless it be for an offence which may have continuance, such as false imprisonment, see 2 B. & P. 425, nusance, or the like; at least such is *the rule in declarations, and *a fortiori*, it should seem, in indictments. See 10 Mod. 335 4 Id. 101. [14]

If no time or place be stated, or if the time or place stated be uncertain or repugnant, the defendant may demur, or move in arrest of judgment, &c.; for the defect is not cured by verdict; see 5 T. R. 162. 2 Hawk, c. 25. s. 77. Yelv. 94. Cro. El. 97, 98. Cro. Car. 525. Arch. Pl. & Ev. 101. 105; the statutes of Jeofail, which cure the defect in civil cases, not extending to criminal proceedings. So, if there be no such place in the county as that laid in the indictment, the indictment is expressly declared to be void by stat. 9 H. 5. st. 1. c. 1. see 3 Camp. 73.

But although time and place must thus be laid with certainty, it is not necessary it should be laid according to the truth; for if the time stated be previous to the finding of the indictment, and the place be within the county or other extent of the court's jurisdiction, a variance between the indictment and evidence in the time when the offence was committed, Kelyng. 16. 2 Inst. 318. 3 Inst. 230. 1 T. R. 70, 71, or in the place where committed, provided the place proved be within the jurisdiction of the court, 2 Hawk. c. 25. s. 84, is not material; and for this reason, in practice, all the facts in an indictment are usually stated to have occurred at the same time and place, time and special venue being laid as to the first fact, and afterwards referred to by the words "*then and there*," as to the others. There are some exceptions however to this rule. 1. The dates of bills of exchange and other written instruments, must be truly stated. 2. Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered. 3. If any time stated in the indictment, is to be proved by matter of record, it must be truly stated. 4. If the precise date of a fact be a necessary ingredient in the offence, it must be truly stated. 5. If the statute upon which the indictment is framed, give the penalty to the poor of the parish in which the offence was committed, the parish must be truly stated. 6. Where a place named is part of the description of a written instrument, or is to be proved by matter of record, it must be truly stated. 7. If the place where the fact occurred be a necessary ingredient in the offence, it must be truly stated: and the slightest variance in these several respects, between the indictment and evidence, will be fatal, and the defendant must be acquitted. See Arch. Pl. & Ev. 331—334. And lastly, where a time is limited for preferring an indictment, the time laid should appear to be within the time so limited. Also, in an indictment, for murder, the death should be laid on a day within a year and day from the time at which the stroke is alleged to have been given.

What is above mentioned as to place, relates merely to special venue, and must be carefully distinguished from place *when stated as matter of local description; for where a place is stated as matter of local description, the slightest variance between the description of it in the indictment and the evidence, will be fatal. Thus, for instance, in indictments for stealing in the dwelling house, &c. for burglary, arson, shooting into a house with an intent to kill, or for forcible en- [15]

try or the like, if there be the slightest variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, it will be fatal.

It must be certain as to the facts, circumstances and intent constituting the offence.] Every offence consists of certain acts done or omitted, under certain circumstances; and in an indictment for the offence, it is not sufficient to charge the defendant generally with having committed it, as that he murdered J. S. or stole the goods of J. S. or committed burglary in the house of J. S. or the like, but all the facts and circumstances constituting the offence must be specifically set forth. So the offence must appear upon the face of the indictment to be a distinct substantive offence; you cannot charge a man with being a common thief, a common champertor, conspirator, common malefactor or common robber, but if he have committed a larceny, robbery, &c. the indictment must set forth every fact and circumstance which is a necessary ingredient in the offence. Thus, an indictment for extortion, charging that the defendant took extorsively for every horse so much, and for every twenty sheep so much, was holden bad, because it charged the defendant with extortion generally, and not upon any particular occasion. 4 Mod. 103. So, that the defendant was a calumniator, and a common and turbulent breaker of the peace, &c. was holden bad, for the same reason. 2 Str. 849. 1246. And the same, where a constable was indicted for behaving badly and negligently in the execution of his office, without specifying any particular instance of negligence, &c. 1 Str. 2. The only exceptions to this rule are, 1. That a man may be indicted for being "a common barretor," without detailing the particulars of the barretry. 2. That a woman may be indicted for being "a common scold," without detailing the particulars of her conduct. 3. That a person may be indicted for keeping a common gambling house or bawdy house, without stating those circumstances which it may be necessary to give in evidence to shew that it is a house of that description. See 2 Hawk. c. 25. s. 57, 59. 4. That in an indictment for soliciting or inciting to the commission of a crime, 2 East, 4, or for aiding and assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance. In all other cases, every fact or circumstance which is a necessary ingredient in the offence, must be set forth in the indictment.

[16] *And if any fact or circumstance which is a necessary ingredient in the offence be omitted in the indictment, such omission vitiates the indictment, and the defendant may avail himself of it by demurrer, motion in arrest of judgment, or writ of error. Thus, an indictment for assaulting an officer in the execution of process, without shewing that he was an officer of the court out of which the process issued; 5 East, 304: for contemptuous or disrespectful words to a magistrate, without shewing that the magistrate was in the execution of his duty at the time; Andr. 226; against a public officer for nonperformance of a duty, without shewing that he was such an officer as was bound by law to perform that particular duty; *Quod exoneravit tormentum dans plagam*, without saying *percussit;* 5 Co. 122 b. that he feloniously did lead away a horse, &c. without saying "take;" 2 Hale, 184: in all these and the like cases, the indictment is bad, and the defect may be taken advantage of in the manner above mentioned.

Every fact and circumstance laid in an indictment, which is not a necessary ingredient in the offence, may be rejected as surplusage, and need not be proved at the trial; also, if there be any defect in the manner of stating such matter, the defect will not vitiate the indictment. 4 Co. 41 a. 5 Co. 121. b. There is a custom of stating, in indictments for trifling of-

fences, circumstances of gross aggravation, contrary to the truth, which are at least useless, and should be avoided.

And not only must all the facts and circumstances, which constitute the offence be stated, but they must be stated with such certainty and precision, that the defendant may be enabled to judge whether they constitute an indictable offence or not, in order that he may demur or plead to the indictment accordingly,—that he may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly,—that he may be enabled to plead a conviction or acquittal upon this indictment, in bar of another prosecution for the same offence—and that there may be no doubt as to the judgment which should be given, if the defendant be convicted. See R. v. Horne, Cowp. 672. Therefore in indictments for burglary, arson, and stealing in the dwelling house, shop, or warehouse, &c. a local description of the house, &c. must be given, namely, the parish or place and county in which it is situate: in indictments for obtaining money by false pretences, the false pretences must be specified: 2 T. R. 581. 2 Str. 1127: in an indictment against a person for not serving the office of constable, the mode of election must be set out, to shew that he was legally elected; for if he were not legally elected, he cannot be guilty of a crime in not serving: 5 Mod. 96: an indictment for extortion must shew what fee was due, or that nothing was payable, 3 Leon. 268, as well as the fee exacted: an indictment for stopping up the King's highway, must specify what part. Show. 389. Also, for the same reasons, if the *indict- [17] ment charge the defendant with one or other of two offences, in the disjunctive, as that he murdered *or* caused to be murdered, forged *or* caused to be forged, 2 Hawk. c. 25. s. 58. 1 Salk. 342, 371, levavit vel levari causavit, 2 Str. 200, conveyed *or* caused to be conveyed, &c. Hardw. 370, it is bad for uncertainty; and the same, if it charge him in two different characters, in the disjunctive, as *quod A. existens servus sive deputatus*, took, &c. 2 Ro. Rep. 263.

Certainty to a certain intent in general, however, is all that is required. Co. Lit. 303. a. 5 Co. 121. a. See Arch. Pl. & Ev. 108. Certainty is of three kinds: certainty to a certain intent in every particular, which is required only in pleas, &c. of estoppel, and pleas in abatement; certainty to a common intent, which is required in ordinary pleas; and certainty to a certain intent in general, which is required in declarations and indictments. The latter is a medium between the other two; not so great a degree of certainty as the first, and a greater degree of certainty than the second. I shall endeavour further to define them. Where certainty to a certain intent in every particular is required, the court will presume the negative of every thing the pleader has not expressly affirmed, and the affirmative of every thing the pleader has not expressly negatived; or, in the words of Lord Coke, the pleader must exclude every conclusion against him. Where certainty to a common intent only is required, the court will presume in favour of the pleader, every proposition which by reasonable intendment is impliedly included in the pleading, though not expressed; and where words are made use of, which admit of a natural sense, and also of an artificial one, or one to be made out by argument or inference, the natural sense shall prevail. Thus, if a plea state that the master and fellows of a college were seised in fee, it shall be intended in right of the college; Plowd. 102; if a man plead a feoffment, livery shall be intended, because it would not otherwise be a feoffment; Co. Lit. 303. b. Cr. El. 401; or if he plead an assignment of dower, it shall be intended by metes and bounds, for otherwise it would not be a

legal assignment. Bro. Pleader, 145. Cro. Car. 162. See Arch. Pl. & Ev. 209—211. Common intent, however, is a rule of construction only, and not of addition; it cannot add to a sentence, words which are not impliedly included in it; and therefore in trespass, if the defendant plead a release, without shewing at what time it was made, the court cannot presume that it was made after the trespass, Plowd. 46. a. unless the particular trespass be specially mentioned in it. Certainty to a certain intent in general, being a medium between the two degrees of certainty above mentioned, may be inferred from what has just now been said respecting them; and it should seem, therefore, that in cases where it is required, every thing which the pleader should have stated, and
[18] which *is not either expressly alleged or by necessary implication included in what is alleged, must be presumed against him. The court, however, will construe the words of the pleading according to their ordinary and usual acceptation, and technical terms according to their technical meaning. And if the sense of a word be ambiguous in the ordinary acceptation of it, it shall be construed according as the context and subject matter require it to be, in order to render the whole consistent and sensible: thus the word "*until*" may be construed inclusive or exclusive of the day to which it is applied, according to the context and subject matter. 5 East, 244. In R. v. Bigg, 1 Str. 18. 3 P. Wms. 419, the defendant was indicted for erasing the indorsement of a bank note, and it appeared that the words erased were on the face of the note, but the jury found that such was commonly called an indorsement; and a majority of the judges held that the description was correct. In indictments against officers for neglect of duty or malversations in their offices, it is sufficient to allege that they were such officers at the time of the offence committed, without showing their appointment; See 5 T. R. 623; for their regular appointment is presumed from their exercising the duties of their offices. If it be stated that the Justices of our Lord the King were assigned by letters patent under "his seal of Great Britain," it shall be presumed to be the great seal, 4 T. R. 521, for it could not be by any other.

Mere matter of inducement, however, does not require so much certainty as the statement of the gist of the offence. 1 Vent. 170. Com. Dig. Indictment, G. 5. So, where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. As in the case of a conspiracy to defraud a person of goods, it is not necessary to describe the goods, as an indictment for stealing them; stating them as "divers goods" has been holden sufficient. 1 Chit. Rep. 698. So, in an indictment for soliciting and inciting another to commit an offence, it is not necessary to state the offence contemplated, with the same degree of certainty as in an indictment for the offence itself, even, it should seem, although the offence were afterwards actually committed. In indictments for perjury, also, the certainty formerly required, according to the rules above mentioned, is now no longer necessary; by stat. 23 G. 2. c. 11, it is necessary only to state the substance of the offence, and in what court or before whom the oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting out the bill, answer, &c. or any part of a record or proceeding in law or equity, other than as aforesaid, and without setting out the
[19] commission of the court or person before whom the perjury *was committed. If however the prosecutor choose to state the offence with greater particularity than is required by this statute, he will

be bound by the statement, and must prove it as laid. 5 T. R. 317, 311. And the same in every other case, where an offence is stated in an indictment with greater particularity than is necessary, the unnecessary allegations, if descriptive of some ingredient in the offence, and not merely of circumstances of aggravation, are material and relevant, and cannot be rejected as surplusage.

Having made these general observations on the certainty required in indictments, we shall now proceed to examine the subject with relation to particular cases.

Written instruments, where they form a part of the gist of the offence charged, must be set out verbatim. Thus, in the case of forgery, the instrument forged must be set out in the indictment, in words or figures; 1 East, 130. Leach, 90, 172. 721; in an indictment for a libel, the libellous matter must be set out verbatim; see 6 T. R. 162; for sending a threatening letter, the letter must be set out verbatim; 2 East, P C. 1123. and see Leach, 631: for not executing a warrant, the nature and tenor of the warrant must be shewn; 1 Vent. 305. Com. Dig. Indictment, G. 3.; so, in an indictment for not obeying the order of Justices of Peace, the order must be set out verbatim. In perjury, it is not necessary to set out the affidavit, answer, &c. on which the perjury is assigned, verbatim, for the stat. 23 G. 2. c. 11, requires only the substance of the offence to be charged; but still it is advisable to set out, verbatim, the passages charged to be false, as it precludes all question of their being in substance the same as the defendant swore. In treason, also, if letters or other written instruments be laid as overt acts, it is sufficient to set forth the substance of them; for the gist of the offence is the compassing, &c. and the overt acts but proofs or evidences of it. Fost. 194. R. v. Preston. 4 St. tr. 411. R. v. Francia, 6 St. tr. 58. 73. In larceny of written instruments, such as bank notes, bills of exchange, &c. it is not necessary the indictment should set them out verbatim; describing them in a general manner is sufficient; 2 East, P. C. 602. 777; thus, "one bank note for the payment of five pounds, and of the value of five pounds," "one bill of exchange for the payment of fifty pounds, and of the value of fifty pounds," or the like.

Where the instrument must be set out verbatim, if the whole of it be included in the offence, the whole of it must be set out in the indictment; as, for instance, in the forgery of a bill of exchange, &c. And even in the case of the forgery of an indorsement or acceptance merely, still the bill, as well as the indorsement, &c. is always set out, in order to shew that it is an instrument, the forgery of an indorsement or acceptance of which is punishable by the statute. But *where [20] upon an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment stated the receipt thus, "8*th March*, 1773. *Received the contents above by me Stephen Withers*," without setting out the account at the foot of which it was written, it was holden sufficient. 1 East, 181. n. And in all other cases, where part only of a written instrument is included in the offence, that part alone is necessary to be set out. As where some parts of a publication are libellous and others not, it is only necessary to state those parts containing the libel; and if the libellous passages be in different parts of the publication, distinct from each other, they may be introduced thus: "In a certain part of which said libel there were and are contained the false, scandalous, malicious and inflammatory words and matter following, that is to say," &c. "And in a certain other part of which said libel there were and are contained," &c. See 1 Camp. 350. Where

the written instrument or parts of it are thus set out verbatim, great care must be taken to set them out correctly; the slightest variance between the indictment and evidence in this respect, would be fatal, and the prisoner would necessarily be acquitted. A mere literal variance, however, (that is, where the omission or addition of a letter does not alter or change a word so as to make it another word, 2 Salk. 661. Cowp. 229) will not be material; as, for instance, "received," for reicevd," Leach, 145. 2 East, P. C. 977; "undertood" for "understood," Cowp. 229, or the like. Where a libel is in a foreign language, it must be set out in the indictment, first in the language in which it is written, otherwise the defendant may demur, move in arrest of judgment, or bring a writ of error; 6 T. R. 162; and secondly, a translation of it must be set out, and must be proved to be a correct translation at the trial. And the same rule, it should seem, is equally applicable to all cases of written instruments in a foreign language.

The recital of written instruments, which must be set out verbatim, is usually introduced by the words "*according to the tenor following*," or "*of the tenor following*," or "*in the words and figures following*," or "*the false, &c. words and matter following*," or other words which imply that a correct recital is intended; on the other hand, when the substance only is intended to be set out, it should be introduced by such words as "*in substance as follows*," "*to the effect following*," or the like. The word "*tenor*" implies that a correct copy is set out; and a variance in such a case would be fatal, 2 East, P. C. 976, even although the pleader need not have set more than the substance of the instrument in that particular case. And the same as to "*the words and figures following*," or "*the words and matter following*." The words, *Ad tenorem et effectum sequentem*, have been holden sufficient as the word **effectum* [21] in such a case may be rejected as surplusage. 2 Salk. 417. 1 Id. 324. 1 L. Raym. 415. The word "*effectum*" by itself, however, implies that the substance only is set out; 2 Salk. 417; and the same, of course, of the words "*in substance as follows.*" 3 Barn. & Ald. 503. It seems also to have been holden by Buller J. (R. v. May, Leach, 227) that the words "in manner and form following," require the substance only to be set out.

If after the word "*tenor*" or the like, the instrument be not set forth correctly, the defendant shall be acquitted for the variance, whether the instrument were required to be set out verbatim or not; *supra;* if, on the other hand, the recital of the instrument be introduced by the words "to the effect following," or "in substance as follows," and the nature of the case require a literal copy to be set forth, the defendant may demur, move in arrest of judgment, or bring a writ of error. See 3 Barn. & Ald. 503.

If an indictment describe a written instrument as *purporting* to be so and so, the instrument when produced in evidence must appear upon the face of it to be what it is described as purporting to be, otherwise the defendant will be acquitted for the variance; or if the instrument be also set out verbatim in the indictment, the defendant may demur, move in arrest of judgment, or bring a writ of error. As for instance, if the instrument be described as "a certain paper writing, purporting to be a bank note," and the note produced, though made to resemble, vary materially in its form from a real bank note: R. v. Jones, 1 Doug. 300: or if described as a bill of exchange "purporting to be directed to one J. King, by the name and description of J. Ring;" for if it were really directed to J. Ring, it could not purport (that is, appear upon the face of it) to be directed to J. King. R. v. Reading, 1 East, 180, n. Leach, 672.

Where words are the gist of the offence, they must be set forth in the indictment with the same particularity as a libel: as, for instance, in an indictment for scandalous or contemptuous words spoken to a magistrate in the execution of his office; 1 Ro. Rep. 79. 2 Str. 699; or for blasphemous or seditious words 2 Str. 686. 1 Id. 498. And if there be any material variance between the words proved and those laid,—even if laid as spoken in the third person and proved to have been spoken in the second, 4 T. R. 217,—the defendant must be acquitted. But if some of the words be proved as laid, and the words so proved amount to an indictable offence, it will be sufficient. Where words are laid as an overt act of treason, it is sufficient to set forth the substance of them; Fost. 194. R. v. Layer 8 Mod. 93. 6 St. tr. 328; for they are not the gist of the offence, but proofs or evidences of it merely.

Where any matter laid in an indictment, is to be proved by a record, great care must be taken that the statement *correspond [22] exactly with the record; for the slightest variance in substance will be fatal. This subject shall be fully considered when we come to treat of the evidence necessary to support an indictment.

Where personal chattels are the subject of an offence, as in larceny, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated: thus, for instance, "one coat of the value of twenty shillings, two pair of boots of the value of thirty shillings, two pair of shoes of the value of twelve shillings, two sheets of the value of thirteen shillings, of the goods and chattels of one J. S.;" or "one sheep of the price of twenty shillings," &c. and the like. If, for instance, it were "twenty wethers and ewes" the indictment would be bad for uncertainty; it should state how many of each. 2 Hale, 183.

The prosecutor is bound by the description of the species of goods stated; as, for instance, an indictment for stealing a pair of shoes, cannot be supported by evidence of a larceny of a pair of boots. But a variance in the number of the articles, or in their value is immaterial, provided the value proved be sufficient to constitute the offence in law. So if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more of a sufficient value, it will be sufficient, although he fail in his proof of the rest.

Money is described as so many shillings, &c. of the current coin of the realm in monies numbered.

Besides what we have hitherto said relative to the certainty required in the statement of an offence in an indictment, it is necessary to add that in an indictment for murder the word *murdravit*, Dy. 261. a. and in an indictment for rape the word "*rapuit*," Staund. 96. a. are absolutely necessary; they are technical words essential to the definition of the offence, without which these offences respectively cannot be described upon the record; and if omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. The words "*vi et armis*," though usual in indictments for offences against the person, are not essential. 37 H. 8. c. 8.

The intention of the party at the time he committed the offence, is often a necessary ingredient in it: and in such cases it is as necessary to state the intention in the indictment, as any other of the facts and circumstances which constitute the offence. See 6 East, 464. In some cases, the law has adopted certain technical expressions to indicate the intention with which an offence is committed; and in such cases the intention must be expressed by the technical word prescribed, and no

other. Thus, treason must be laid to have been done "*traitorously;*" all felonies to have been done "*feloniously;*" petit treason is generally laid to have been done "*traitorously and feloniously,*" in order
[23] that if the additional ingredient in the *crime of murder which makes it petit treason be not proved, the defendant may still be found guilty of the murder: burglary is laid to have been done "*feloniously and burglariously,* and with intent to commit a particular felony; murder, "*feloniously* and *of his malice aforethought;*" 2 Hale, 184, 187: forgery, "*feloniously*" (if made felony by statute) and with intent to defraud, &c.

Where a statute takes away the benefit of clergy from a common law felony, if committed under particular circumstances, an indictment for the offence, in order to oust the defendant of clergy, must expressly charge it to have been committed under these circumstances, and must state the circumstances with certainty and precision. 2 Hale, 170.

Lastly, as to indictments for offences created by statute: the statute contains a definition of the offence and the offence consists of the commission or omission of certain acts, under certain circumstances, and in some cases with a particular intent. An indictment, therefore, for an offence against the statute, must, with certainty and precision, charge the defendant to have committed or omitted the acts, under the circumstances and with the intent, mentioned in the statute; and if any one of these ingredients in the offence be omitted the defendant may demur, move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict; see 2 East, 333; nor will the conclusion *contra formam statuti* cure it. 2 Hale, 170. and see 8 T. R. 536. Com. Dig. Information, D. 3. Thus an indictment upon stat. 5 El. c. 11. s. 2. (which makes it high treason to clip, round, or file any of the coin of the realm, "for wicked lucre or gains' sake,") must charge the offence to have been committed for the sake of wicked lucre or gain, otherwise it would be bad 1 Hale, 220. So an indictment on that part of the black act which makes it felony "*wilfully and maliciously,*" to shoot at any person in a dwelling house or other place, was holden bad, because it charged the offence to have been done "*unlawfully and maliciously,*" omitting the word "wilfully;" R. v. Davis, Leach, 556: some of the judges indeed thought that "maliciously" included "wilfully;" but the greater number held, that as wilfully *and* maliciously were both mentioned in the statute as descriptive of the offence, both must be stated in the indictment. So, where an indictment on stat. 15 G. 2. c. 34. & 14 G. 2. c. 6. (which makes it felony without benefit of clergy to steal any cow, ox, heifer, &c.) charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was holden to be a fatal variance; for the statute having mentioned both cow and heifer, proved that the words were not considered by the legislature as synonymous. R. v. Cooke, 2 East, P. C. 617, Leach, 123. See also
1 Camp. 212. But where a word not in the statute, is substituetd
[24] in the indictment for one that is, and the word thus substituted *is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. As, for instance, if the word "*knowingly*" be in the statute, and the word "*advisedly*" substituted for it in the indictment, 1 B. & P. 181, or the word "*wilfully*" in the statute, and "*maliciously*" in the indictment, (the words '*advisedly*" and "*maliciously*" not being also in the statutes respectively, *vide supra*) the indictment would be sufficient. It is much better however to pursue strictly the words of the statute, as it precludes all question about the meaning of the expressions

used; besides the court, *in favorem vitæ*, are sometimes inclined to listen to and countenance very nice distinctions upon the subject. Thus an indictment on stat. 2 G. 2. c. 25, (which makes the stealing of "bank notes" felony) charging the defendant with stealing "a certain note *commonly called* a bank note," was holden bad, because it did not follow the description of property in the statute. R. v Craven, 2 East, P. C. 601, 602. *See also the cases above mentioned.* And pursuing the words in the statute is in general sufficient; unless indeed they be generic terms, in which case it is necessary to state the species, according to the truth of the case. Thus, in an indictment on stat. 37 G. 3. c. 70, (making it felony to endeavour to seduce a soldier or sailor from his duty) it is sufficient to charge an *endeavour*, &c. without specifying the means employed. 1 B. & P. 180. But where a statute, for instance, makes the maliciously killing of cattle a felony, it is not sufficient in an indictment on the statute to charge the defendant with *killing* "cattle" generally, but the species of cattle, as horse, mare, gelding, cow, heifer, ox, &c. must be stated. And where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it: as, for instance, where by the usage of a public office the bare signature of a party upon a navy bill operated as a receipt, an indictment for forging such a receipt, setting forth the navy bill and indorsement, and charging the defendant with having forged "a certain receipt for money, to wit, the sum of £25 mentioned and contained in the said paper called a navy bill, which forged receipt was as follows, that is to say,—*William Thornton, William Hunter*," was holden bad, because it did not shew by proper averments that these signatures imported a receipt. R v. Hunter, 2 Leach, 624, 2 East, P. C. 928. In like manner it was holden that an indictment for forging the word "*settled*" at the bottom of a bill, must shew by proper averments that it is a receipt. R. v. Thompson, 2 Leach, 910. *See further on this subject*, Arch. Pl. & Ev. 93. 140. The statute itself need not be recited. See Arch. Pl. & Ev. 140.

*If there be any exception contained in the same clause of the [25] act which creates the offence, the indictment must shew, negatively, that the defendant or the subject of the indictment does not come within the exception. 1 T. R. 141. 15 East, 456. 1 East, 643. 6 T. R. 559. and see 5 T. R. 83, Leach, 580, 2 East, P. C. 782. 1 Barn. & Ald. 362. Arch. Pl. & Ev. 141. But if an exception or proviso be in a subsequent clause or statute, 1 T. R. 320, or, although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, 1 Barn. & Ald. 94, it is in that case matter of defence for the other party, and need not be negatived in the pleading.

Before we conclude this part of our subject, it may be necessary to observe that no part of the indictment must be in figures; and therefore numbers, dates, &c., must be stated in words at length. 2 Hale, 170. The only exception to this is, where a *fac simile* of a written instrument is to be set out, as in the case of forgery; in which case, it must be set out in the indictment in words and figures, as in the original itself. R. v. Mason, 1 East, 180.

In conclusion: if all the ingredients in the offence (whether it be an offence at common law or one created by statute) be not set forth in the indictment, or if any of them be not stated with sufficient certainty, the defendant may demur, move in arrest of judgment, or bring a writ of error. See R. v. Mason, 2 T. R. 581. If on the other hand, the offence

be well laid, but there be a material variance between the offence as laid, and the evidence offered to support it, the defendant must be acquitted.

It must not be double.] The defendant must not be charged with having committed two or more offences in any one count of the indictment; for instance, one count cannot charge the defendant with having committed a murder and a robbery, or the like. The only exception to this rule is to be found in indictments for burglary, in which it is usual to charge the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended. Laying several overt acts in a count for high treason, is not duplicity, Kelyng, 8. because the charge consists of the compassing &c., and the overt acts are merely evidences of it; and the same, as to conspiracy. That the defendant published and caused to be published a libel, is not double, for they are the same offence So a count in an indictment charging a man with one endeavour to procure the commission of two offences, is not bad for duplicity, because the endeavour is the offence charged. 1 B. & P. 181. And it is now generally understood that a man may be indicted for the battery of two or more persons, in the same count, without rendering the count bad for duplicity, 2 Bur. 984. see 2 Str. 870, 2 L. Raym. 1572. cont.

[26] *In civil actions, the usual mode of objecting to pleadings for duplicity, is by special demurrer; it is cured by general demurrer, or by the defendants pleading over. See Arch. Pl & Ev. 96. In criminal cases the defendant may object to it by special demurrer, perhaps upon a general demurrer, or the court in general, upon application, will quash the indictment; but it is extremely doubtful if it can be made the subject of a motion in arrest of judgment or writ of error; and it is cured by a verdict of guilty as to one of the offences, and not guilty as to the other.

It must be positive] Every fact and circumstance stated in an indictment, must be laid positively, that is, the indictment must directly affirm that the defendant did so and so, or that such a fact happened under such and such circumstances; it cannot be stated by way of recital, "*that whereas*" &c. or the like. 2 Hawk. c. 25. 60. 1 Show. 337. 1 Salk. 371. 2 L. Raym. 1363. As, for instance, where an indictment for not obeying a Justice's order, set forth the order by way of recital, "*that whereas a certain order*," &c, although it charged the not obeying the order positively, it was holden bad. R. v. Crowherst, 2 L. Raym. 1363. So, stating a matter by way of argument or inference would render the indictment bad; as, for instance, that by certain indenture *testatum existit* that J. S. demised &c.; and this, perhaps, even in mere matter of inducement, although in one case the contrary certainly has been decided. 3 Salk. 171.

A defect in these respects is not cured by verdict; and consequently the defendant may take advantage of it by demurrer, motion in arrest of judgment, or writ of error.

It must not be repugnant.] Where one material part of an indictment is repugnant to another, the whole is void: as, for instance, an indictment charging the defendant with forging a bond by which J. S. was *bound*, &c. (which is impossible if the writing be forged); or with *disseising* A, and it appear upon the face of the indictment that A, had but an estate for years; 2 Hawk. c. 25. s. 62; with stealing the goods of the *said* J. S., where the name of J. S. was not previously mentioned, Id. s. 72, or in the parish *aforesaid*, where no parish was before mentioned; Ante, p. 13; for forging a bill of exchange, stating it to be *signed* by the party

whose signature was alledged to be forged, 2 East, P. C. 985, or the like. If the repugnancy however be in an immaterial part, it may in general be rejected as surplusage, especially after verdict. Bac. Abr. Pleas, I. 4. But still it is a general rule, that an allegation in pleading, which is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a *videlicit*, however *inconsistent it may be with an allegation subsequent. 5 East, 244. See Arch. Pl. & Ev. 112, 113. [27]

Averments how made.] The usual way of making an averment in an indictment, is thus: "*And the jurors aforesaid upon their oath aforesaid, do further present that,*" &c , or if it be connected with what has immediately preceded it, it may be introduced simply thus, "*And that,*" &c., then proceeding to state the matter of the averment. But when the matter of the averment is but a mere adjunct of some person or thing preceding, it does not require even this technical mode of introducing it: thus, "that A. *being* an officer," &c., is a sufficient averment that A. was an officer; see 2 Ro. Rep 226. 2 Bur 832. 864. 3 Id. 1232. 2 Hawk c. 25. s. 112; "that A., *knowing* that B. was indicted for forgery, concealed a witness against him," is a sufficient averment that B. was indicted, Fitzg. 122. 263; so, "*dans* plagam mortalem," 5 Co. 120. March. pl. 127, or "*sciens* that," &c. 2 Str. 904, is a good averment. So, where an indictment for perjury stated that "at and upon the hearing of the said complaint," the defendant deposed, &c., this was holden to be a sufficient averment that the complaint was heard. 1 T. R. 70.

3. *Conclusion of the Indictment.*

For an offence at common law.] An indictment for an offence at common law, concludes thus: "*Against the peace of our Lord the King, his crown and dignity.*" Indictments for nuisance usually conclude, "to the great damage and common nuisance of all the liege subjects of our said Lord the King,"&c. as well as, "against the peace," &c.; but this conclusion *ad commune nocumentum*, does not seem to be essential.

The words "against the peace of our Lord the King," however, seem to be essential in all cases, 2 Hale, 188. Cro. Jac. 527. Cro. Car. 584. 6 Mod. 128, excepting in indictments for nonfeasance, 1 Vent. 108, 111. 1 Salk. 381; and even in these they are uniformly used: "against the peace," without saying "of our Lord the King," would be insufficient. 2 Hale, 188. If the offence were committed in the reign of the late King, the indictment should conclude, "against the peace of our Lord the *late* King," &c.; if "of our Lord the King," or "of our Lord the now King," it would be bad, 2 Hale, 189, and the defendant might move in arrest of judgment, 3 Bur. 1901, or bring a writ of error. *Contra pacem nuper regis et regis nunc*, might answer in such a case, *Yelve.* 66, because the words "*et regis nunc*" might be rejected as surplusage; on the other hand, if an offence (as for instance a nuisance) commence in the reign of one king, and still continue in the reign *of his successor, the indictment should properly conclude, against the peace of both. 2 Hale, 189. [28]

The words "his crown and dignity," though always used, are not essential. 2 Hale, 188.

Omitting to conclude "against the peace," &c., when it is essential, or concluding against the peace of the present King, when it appears upon the face of the indictment, that the offence was committed in a former reign,

may be objected to by demurrer, motion in arrest of judgment, or writ of error.

For an offence by statute.] An indictment for an offence created by statute, concludes thus :—" *Against the form of the statute in such case made and provided, and against the peace of our Lord the King his crown and dignity.*"

Where a statute either creates the offence altogether, or makes an offence at common law an offence of a higher nature, (as, for instance, where it makes a misdemeanor a felony,) an indictment for the offence must conclude, "*contra formam statuti*," 2 Hale, 192. 2 Hawk. c. 25. s. 116. 1 Salk. 370. 2 Ro. Rep. 38. If the statute do not make it an offence of a higher nature, but merely increase or otherwise alter the punishment, &c. (as for instance perjury under stat. 5 El. c. 9) the indictment, in order to bring the offence within the statute, must conclude, "*contra formam statuti;*" but if it do not so conclude, it may still be a good indictment for the offence at common law. 2 Hale, 191, 192. Or if the statute be merely declatory of an offence at common law, (as high treason, for instance,) without adding to or altering the punishment, &c. an indictment for the offence may conclude, "*contra formam statuti*," or, as at common law. 2 Hale, 189.

But where a statute merely takes away a certain privilege or benefit from a person committing a common law offence under particular circumstances, to which benefit or privilege the defendant would have been entitled at common law, as for instance, where it takes away the benefit of clergy from a common law felony, an indictment for the offence, although it must charge it to have been committed under the circumstances mentioned in the statute, should not conclude, "*contra formam statuti*," 2 Hale, 190. Thus, indictments for petit treason, murder, robbery, burglary, house-breaking, stealing in a dwelling house, and the like, need not conclude, "*contra formam statuti.*" *Id.*

Where one statute is relative to another, as where one creates the offence, and the other the penalty, an indictment for the offence must conclude, *contra formam statutorum.* 2 Hale, 173. Cro. Jac. 142. But where the offence is prohibited by several independant statutes, the indictment may conclude, *contra formam statutorum*, or *statuti*. 2 Hawk. c. 25.

[29] *s. 117. If the statute creating the offence be temporary, and be continued or made perpetual by another statute, an indictment for the offence may conclude, *contra formam statuti* ; 2 Hale, 173. Cro. El. 750. 2 Str. 1066 ; but where a former statute is discontinued, and revived by a subsequent one, Lord Hale says, that it is safer in such a case, to conclude, *contra formam statutorum*, although, according to good authorities, *contra formam statuti*, would be sufficient. 2 Hale, 173.

Omitting to conclude *contra formam statuti*, when it is essential, is error, and may be made the subject of demurrer, motion in arrest of judgment, or writ of error. So, concluding *contra formam statuti*, for *statutorum*, or the contrary, may be made the subject of a demurrer, or perhaps of a motion in arrest of judgment, or writ of error, although in civil actions it is cured by verdict. Dyer, 346, 347. But if an indictment conclude, *contra formam statuti*, when it should conclude as at common law, the mistake is not material, and the words *contra formam statuti*, may be rejected as surplusage. R. v. Mathews, 5 T. R. 162. Say. 225. 1 Vent. 103. 2 Hale, 190.

In an indictment on a statute, besides the conclusion *contra formam statuti*, the words "against the peace of our Lord the King," are abse-

lately essential ; 2 Hale, 188 ; and if these latter words be omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error.

SECT. 3.

Joinder of two or more defendants in one Indictment.

Where several persons join in the commission of an offence, all or any number of them may be jointly indicted for it, or each of them may be indicted separately. Thus, if several commit a robbery, burglary, or murder, they may be indicted for it jointly, 2 Hale, 173, or separately ; and the same, where two or more commit a battery, or are guilty of extortion, or the like. 1 Salk. 382. Where money has been obtained under false pretences, and the false pretences were conveyed by words spoken by one defendant in the presence of the others, all of whom acted in concert together, it was holden that they might all be indicted jointly. 3. T. R. 98. So, where two persons joined in singing a libellous song, it was holden that they might be indicted jointly ; 3 Bur. 985 ; and the same, where two or more persons join in any other kind of publication of a libel. But if the publication of each party be distinct, as if two booksellers, not being partners, sell the libel at their *respective [30] shops, they must be indicted separately. So, two or more cannot be jointly indicted for perjury, 2 Str. 921, or for seditious or blasphemous words, or the like, because such offences are in their nature several. Even where several commit a joint act, which act however is not of itself illegal, but becomes so merely by reason of some circumstances applicable to each individual severally and not jointly, they must be indicted separately ; 2 Hawk. c. 25. s. 89 ; thus, several partners cannot be indicted jointly for exercising their trade without having served an apprenticeship. 1 Salk. 382. Str. 623. But principals in the first and second degree, and accessaries before and after the fact, may all be joined in the same indictment ; 2 Hale, 173 ; or the principals may be indicted first, and the accessaries after the conviction of the principals. It is said that several may be jointly indicted for severally erecting common inns, *ad commune nocumentum*, if it be said, that they *separaliter erexerunt, &c.* ; and the same as to keeping disorderly houses, *&c. Id.* ; but it is much better, and more usual in practice, to indict the proprietors of each house separately.

Misjoinder of defendants may be made the subject of a demurrer, motion in arrest of judgment, or writ of error ; or the court will in general quash the indictment. But where there are different counts against different persons in the same indictment, this, though a ground for moving to quash the indictment, is, it seems, no cause of demurrer, R. v. Kingston, 8 East, 41, provided the counts be otherwise such in substance as may be joined.

SECT. 4.

Joinder of several offences in one Indictment.

We have already seen (*ante* p. 25) that if a defendant be charged with two or more offences in the same count of an indictment, the count will be bad for duplicity, except in one or two excepted cases. As to charg-

ing a defendant with different offences in different counts, it admits of a different consideration.

In an indictment for high treason, there may be different counts, each charging the defendant with different species of treason against the King and his government, such as compassing the King's death, levying war, adhering to the King's enemies, within stat. 25 Ed. 3. st. 5. c. 2,
[31] and the conspiracies to *levy war within stat. 36. G. 3. c. 7. s. 1; but you cannot join counts for treasons against the King and his government, and treasons relating to the coin or the like, because the judgments are different; at least I have never known or read of an instance of the kind.

A defendant ought not to be charged with different felonies in different counts of an indictment; as for instance, a murder in one count and a burglary in another, or a burglary in the house of A. in one count, and a distinct burglary in the house of B. in another, or a larceny of the goods of A. in one count, and a distinct larceny of the goods of B. at a different time in another. If the objection in such a case be made before the defendant has pleaded or the jury are charged, the judge in his discretion may quash the indictment; or if it be not discovered until after the jury are charged, the judge may put the prosecutor to his election on which charge he will proceed; 3 T. R. 106; but it is no objection in arrest of judgment. 3 T. R. 98. However, although a prosecutor cannot thus charge a defendant with different felonies in different counts, yet he may charge the same felony in different ways in several counts, in order to meet the facts of the case; as for instance, if there be a doubt whether the goods stolen, or the house in which a burglary or larceny was committed, be the goods or house of A. or of B., they may be stated in one count as the goods or house of A., and in another as the goods or house of B. See 2 B. & P. 508.

Indictments for misdemeanors, may contain several counts for different offences, provided the judgment upon each be the same. 3 T. R. 98, 106. 8 East, 46; and see 2 Bur. 984. Even where several different persons were charged in different counts with offences of the same nature, the court held that it was no ground for a demurrer, however it might be for an application to the discretion of the court to quash the indictment. 8 East, 41.

It may be necessary to mention that the court will not order counts to be struck out of an indictment, as they will out of a declaration in civil cases; for the latter is the suggestion of the party merely, the former the finding of a grand jury. R. v. Pewtress, 2 Str. 1026. Hardw. 203.

The commencement of a second or subsequent count is in form thus: "*And the jurors aforesaid upon their oath aforesaid do further present that*," &c., so proceeding to state the offence.

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[32] *Sect. 5.

Within what time the bill must be preferred.

At common law there was no time limited for commencing a suit by the King; and therefore, in all cases of treason, felony, and misdemeanor, where a time is not now limited by statute, the indictment may be preferred at any length of time after the offence.

Indictments for such high treasons, not relating to the coin or seals, as

cause corruption of blood, (with the exception of treason by "designing, endeavouring, or attempting any assassination of the King by poison or otherwise," 7 & 8 W. 3. c. 3. s. 6.) must be found by the grand jury within three years next after the offence committed, if the offence have been committed within England, Wales, Berwick upon Tweed, 7 & 8 W. 3. c. 3. s. 5, or Scotland; See Fost. 249; but if committed on the high seas or in a foreign country, there is no time limited for the prosecution.

Prosecutions on 8 & 9 W. 3. c. 26. s. 1. for making, mending, or having certain instruments of coinage, or on sec. 3, for marking the edges of current coin or coin counterfeit to it with letters or grainings, &c. must be commenced within six months after the offence committed; 7 Ann. c. 25. s. 2. 1 Ann. st. 1. c. 9. s. 2; and prosecutions on the 2d section of the same statute, for conveying certain instruments for coining out of his Majesty's mint, or on sec. 4, for colouring, gilding, &c. coin to make it look like the current coin of the realm, must be commenced within three months. In R. v. Willace, 1 East. P. C. 186, it was holden that the information and proceeding before the magistrate, upon the defendant's being taken, was to be deemed the commencement of the prosecution within the meaning of these acts.

Prosecutions on stat. 15 G. 2. c. 28, for colouring, &c. silver coin to make it look like gold, or brass coin to make it look like silver, must be commenced within six months after the offence committed. 15 G. 2. c. 28. s. 5.

Prosecutions for offences against the Black Act (9 G. 1. c. 22,) must be commenced within three years after the offence committed. 9 G. 1. c. 22. s. 13.

Prosecutions on stat. 33 G. 3. c. 67, for maliciously setting fire to a ship, or maliciously destroying or damaging her by other means, must be commenced within twelve calendar months after the offence committed. § 8.

I am not aware of any other cases in which a time is limited for commencing a prosecution.

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*Sect. 6. [33]

Indictment, how found.

In ordinary cases, upon furnishing the clerk of the arraigns or clerk of the indictments at the assizes, or the clerk of the peace at sessions, with the particulars of the offence, he will draw the indictment; but in cases where more than ordinary care may be requisite in framing the indictment, it is better to get it drawn by counsel, and then let it be engrossed on plain parchment without stamp.

As soon as the indictment is engrossed, a clerk of the clerk of arraigns, or of the clerk of the peace, will administer the oath to the witnesses intended to be examined before the grand jury, and indorse their names on the indictment; he will then lay it before the grand jury.

After the indictment has been taken to the grand jury room, it will come under the consideration of the grand jury in its turn. The witnesses are then called in, in the order in which their names are indorsed on the indictment, and examined by the grand jury; and if the offence should appear to a majority of the jury (consisting of twelve at least) to have been sufficiently proved, the clerk of the grand jury will indorse on the indict-

ment, "*A true bill;*" but if the majority should be of opinion that the offence has not been sufficiently proved, the words "*no true bill*" are in that case indorsed on the indictment. Afterwards the foreman, accompanied by the other grand jurors, carries the indictments so indorsed into court, and delivers them to the clerk of the arraigns or clerk of the peace, who thereupon states to the court the substance of each, and the indorsement upon it.

In strict legal parlance, an indictment is not so called, until it has been found "*a true bill*" by the grand jury; before that, it is named a bill merely.

The grand jury may require the same evidence, written and parol, as may be necessary to support the indictment at the trial. They are not, however, usually very strict as to documentary evidence; they often admit copies, where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. But as they may insist on the same strictness of proof as must be observed at the trial, it may be prudent in all cases to be provided, at the time the bill is preferred, with the same evidence with which you intend afterwards to support the indictment. It must be observed, however, that it is no objection that witnesses are called and examined at the trial, whose names are not on the back of the indictment.

[34] If witnesses will not come forward voluntarily to give evidence before the grand jury, you may sue out a *subpœna* or **subpœna duces tecum*, either at the crown office in London or with the clerk of the arraigns in the country, for the assizes, or at the crown office, or with the clerk of the peace, for the sessions, and serve each of them with a copy, or *subpœna* ticket, as it is termed. Or if the witness be in prison, he may be brought up by *habeas corpus ad testificandum*, to be sued out in the manner hereinafter mentioned, under the title Evidence.

The grand jurors who find the bill, must be of the King's liege people, returned by sheriffs or bailiffs of franchises, without nomination of any, and of whom none shall be outlawed, or fled to sanctuary for treason or felony, otherwise the indictment shall be void; 11 Hen. 4. c. 9; and if any one be outlawed, or returned at the nomination of the party, &c. the indictment is void, though twenty others be upon the inquest. 2 Hale, 202. Com. Dig. Indictment A. The bill also must be found by a majority of the jurors, and that majority must consist of twelve at least; for which reason it is that the number of persons on a grand jury cannot exceed twenty-three, nor be less than twelve. It is said that a grand jury cannot find *billa vera* as to part, and *ignoramus* as to the other part, of an indictment, for they ought to find the whole or nothing. 2 Hawk. c. 25. s. 2. Yelv. 99. 1 Sid. 414. Thus, if upon an indictment for libel they find *quoad* the words *billa vera, sed utrum, maliciose, ignoramus*, the finding is void. 1 Leon. 287. But this has reference only to the same count in the indictment; for it is clear that they may find *billa vera* as to one count, and *ignoramus* as to another. Cowp. 325. They cannot however find the bill conditionally, as for instance, "*si messuagium sit in possessionem domini regis, tunc billa vera.*" Yelv. 15. Upon an indictment for murder against A. & B., they cannot find *billa vera* as to A., and as to B. manslaughter only; 1 Ro. Rep. 407; for if it were murder in A., it could not be merely manslaughter in B. But they might find *billa vera* as to A., and *ignoramus* as to B.; see Cro. Car. 464; or they might find one or both of them guilty of manslaughter. Upon an indictment for murder, however, the jury cannot find *billa vera se defendendo*; 2 Ro. Rep. 52; for the offence charged is a felony, the offence found is not.

It may be necessary to mention, that if a bill be thrown out, although it cannot again be preferred to the same grand jury, during the same assizes or sessions, it may be preferred and found at the next sessions or assizes, if no time be limited for preferring it, or if the time limited have not elapsed.

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*Sect. 7. [35]

Indictment, in what cases quashed.

In what cases.] Where an indictment is so defective that no judgment can be given upon it, even should the defendant be convicted, the court, upon application, will in general quash it. Thus, for instance, they have quashed an indictment for perjury found at sessions, because the sessions have no *jurisdiction of* perjury; 2 Str. 1088; and an indictment against six for exercising a trade, because it was a distinct offence in each, and could not therefore be made the subject of a joint prosecution; 4 Bur. 2046, Str. 623. and see Id. 921; and there are several instances where indictments have been quashed, because the facts stated in them did not amount to an offence punishable by law; see Andr. 230. 1 Bur. 516, 543; as, for instance, an indictment for contemptuous words spoken to a Justice of Peace, not stating that they were spoken to him whilst in the execution of his office. Andr. 226.

Where the application is made upon the part of the defendant, the court have almost uniformly refused to quash an indictment, where it appeared to be for some enormous crime, such as treason or felony, Com. Dig. Indictment, H. and see 1 Wils. 325, forgery, perjury, or subornation. 1 Salk. 372. 1 Sid. 54. 1 Vent. 370. They have also refused to quash indictments or cheats, 6 Mod. 42, for selling flour by false weights, 3 Bur. 1841, for extortion, 5 Mod. 13, for not executing a magistrate's warrant, 2 Str. 1211, against overseers for not paying money over to their successors, 2 Str. 1268, and the like. The court also will not quash indictments for not repairing highways or bridges, 1 Salk. 372. 1 Sid. 40, or for other public nuisances, 1 Salk. 372. 1 Vent. 370. Andr. 220, unless there be a certificate that the nuisance is removed; Cro. Car. 584. 2 Salk. 460; nor will they quash an indictment for a forcible entry, 6 Mod. 96, unless perhaps where the possession has been afterwards given up. Also, where the alleged defect was that the indictment did not conclude *contra formam statuti*, the court refused to quash it. 1 Str. 602.

But if the application be made on the part of the prosecution, the court will quash the indictment, in all cases where it appears to be so defective that the defendant cannot be convicted on it, and where the prosecution appears to be *bonâ fide*, and not instituted from malicious motives or for the purposes of oppression. If the prosecution be instituted by the Attorney General, an application to quash the indictment is never made upon the part of the prosecutor; because he may himself enter a *nolle prosequi*, which will have the same effect. 1 Doug. 239, 240.

How.] The application to quash an indictment is made to [36] the court where the bill is found; except in cases of indictments at sessions or in other inferior courts, in which cases the application is made to the Court of King's Bench, the record being previously removed there by *certiorari*.

The application, if made upon the part of the defendant, must be made before plea pleaded; Fost. 231. Holt. 684, 4 St. Tr. 677; and where

the indictment had already, upon the application of the defendant, been removed into the Court of King's Bench by *certiorari*, the Court refused to entertain a motion by the defendant to quash the indictment, after a forfeiture of his recognizance by not having carried the record down for trial. 1 Salk. 380. But if the application be made upon the part of the prosecution, it should seem that it may be made at any time before the defendant has been actually tried upon the indictment. See 3 Bur. 1468. Where the application is made to the Court of King's Bench, there is no objection to its being moved on the last day of the term. 1 Bur. 651.

Before an application of this kind is made on the part of the prosecution, a new bill for the same offence must have been preferred against the defendant, and found. 2 East, 226. And when the court, upon such an application, order the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason of such former indictment, 3 Bur. 1469, that the second indictment shall stand in the same plight and condition to all intents and purposes that the first would have done if it were not quashed, 3 Barn. & Ald. 373. 3 Bur. 1468. 1 W. Bl. 460, and (particularly where there has been any vexatious delay upon the part of the prosecutor, 3 Bur. 1468. 1 W. Bl. 460,) that the name of the prosecutor be disclosed. 3 Barn. & Ald. 373.

*CHAPTER II.

Information.

SECT. 1. *Information* ex officio.
2. *Information by the Master of the Crown Office.*

SECT. 1.

Information ex officio.

What, and in what cases.] THE information *ex officio*, is a formal written suggestion of an offence committed, filed by the king's attorney general (or, in the vacancy of that office, by the solicitor general, 4 Bur. 2527,) in the court of King's Bench, without the intervention of a grand jury.

It lies for misdemeanors only, and not for treasons, felonies, Com. Dig. Information, A. 1. 1 Show. 107. 5 Mod. 459, or misprision of treason; 2 Hawk. c. 26, s. 3; for wherever any capital offence is charged, or an offence so highly penal as misprision of treason, the law of England requires that the accusation should be warranted by the oath of twelve men, before the defendant be put to answer it. The usual objects of informations *ex officio* are properly such enormous misdemeanours, as peculiarly tend to disturb or endanger the king's government, or to molest or affront him in the regular discharge of his royal functions; 4 Bl. Com. 304; such, for instance, as seditious or blasphemous libels or words; seditious riots not amounting to high treason; libels upon the king's ministers, the judges, or other high officers, reflecting upon their conduct in the execution of their official duties; obstructing such officers in the execution of their duties; obstructing the king's officers in the collection, &c. of the revenue; against officers themselves for bribery, or for other corrupt or oppressive conduct, and the like.

Form of it.] The form of an information *ex officio*, is thus:

" Trinity Term, 3 Geo. 4.

" MIDDLESEX: *Be it remembered that Sir Robert Gifford, Knight, Attorney General of our Sovereign Lord the King, who *for our* [38] *said Lord the King prosecutes in this behalf, in his proper person comes into the court of our said Lord the King before the King himself at Westminster in the county of Middlesex, on* [Wednesday next after three weeks of the Holy Trinity in this same term], *and for our said Lord the King gives the court here to understand and be informed, that,*" &c. so proceeding to state the facts and circumstances constituting the offence, with the same certainty and precision as in an indictment, and in the same form, and according to the same rules, excepting that in introducing averments, instead of the words "*And the jurors aforesaid upon their oath aforesaid do further present,*" are used the words, "*And the said Attorney General of our said Lord the King, for our said Lord the King, further gives the court here to understand and be informed that,*" &c. The conclusion is the same as in an indictment.

The second and subsequent counts commence thus: "*And the said Attorney General of our said Lord the King, for our said Lord the King, further gives the court here to understand and be informed that,*" &c. so proceeding to

state the offence, and concluding as in an indictment. And to the conclusion of the last count are added these words: "*And therefore the said Attorney General of our said Lord the King prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said J. S. in his behalf, to make him answer to our said Lord the King, touching and concerning the premises aforesaid.*"

This information is filed in the crown office without any leave previously obtained of the court for that purpose, and the court therefore will not entertain a motion by the attorney general for a criminal information at the suit of the crown, as in the ordinary cases of an information by the master of the crown office at the suit of an individual. 3 Bur. 1564. 4 Bur. 2089.

The court will not quash an information *ex officio*, at the instance of the prosecutor, because the attorney general may, if he will, enter a *nolle prosequi*; 1 Doug. 239, 340; and even upon the motion of the defendant, they will seldom quash them, but generally put the defendant to demur, &c. See Com. Dig. Information, D. 4.

SECT. 2.

Informations by the Master of the Crown Office.

What, and in what cases.] AN information by the master of the crown office, is a formal written suggestion of an offence committed, filed
[39] in the court of King's Bench, at the instance *of an individual, with the leave of the court, by the master of the crown office, without the intervention of a grand jury.

This, like the information *ex officio* (see ante, p. 37,) lies for misdemeanors only, and not for treasons, felonies, or misprision of treason. Although the court have it in their discretion to give leave to file a criminal information of this description, for any misdemeanor whatever, yet they usually confine it to gross and notorious misdemeanors, riots, batteries, libels, and other immoralities, of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deserves the most public animadversion. Thus, for instance, they have granted a criminal information for an attempt to bribe a privy counsellor to obtain a patent of an office under government; 4 Bur. 2494; for an attempt to bribe at an election for members to serve in parliament; 1 W. Bl. 541; for bribing persons, either by money or promises, to vote at elections of officers of corporations, 2 L. Raym. 1377, and the like. They have granted a criminal information for endeavouring to procure the appointment of certain persons to be overseers of the poor, with a view to derive a private advantage to the party. 1 East, 154, n. Where a music master, in consideration of a sum of money, assigned over his female apprentice to a gentleman, under pretence of her receiving lessons from him in music, but really for the purpose of prostitution, the court upon application granted a criminal information against the gentleman, the music master, and the attorney who drew the assignment. 3 Bur. 1434. 1 W. Bl. 410. 439. They will grant a criminal information also, for libels reflecting on the conduct of private individuals, if attended with circumstances of aggravation; See 2 Bur. 980. 1 Doug. 283. 387. Andr. 228; and for libels reflecting on the conduct of magistrates in the execution of their duties, see 1 Wils. 22. of members of parliament in the execution of their

duties in parliament, see 1 Doug. 387, of persons high in office under government in the execution of their several duties, and the like. Where an order was made by a corporation and entered on their books, stating that J. S. (against whom a jury had given a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in the court of Common Pleas) was actuated by motives of public justice, &c. in preferring the indictment, the court, deeming the order to be a libel reflecting upon the administration of justice, upon application granted a criminal information against the parties concerned in making it. 2 T. R. 199. So, where a defendant in an information, immediately before the trial, distributed handbills in the assizes town, vindicating his own conduct and reflecting on that of the prosecutor; the court, considering the handbills to have been distributed by the defendant *for the purpose of influencing the jury in his favour [40] at the trial, granted a criminal information against him. 4 T. R. 285. So, the court granted a criminal information against a person for publishing the proceedings before a coroner, with comments, previously to the trial, although the statement were correct and no malicious motive shewn; for such publications have a tendency improperly to influence the public mind, and particularly the jury by whom the cause is afterwards to be tried. 1 Barn. & Ald. 379. The court will grant a criminal information against a magistrate for any illegal act committed by him from corrupt or vindictive motives; see 2 T. R. 190. 1 T. R. 692. 3 Bur. 1716. 1317. 1 Doug. 426. See Andr. 238. 272. 1 Str. 21. 413; but not where he appears to have acted from ignorance or mistake merely; 1 T. R. 653. 1 East. 186. 3 Bur. 1318. 2 Id. 785. 1162. 3 Barn. & Ald. 432; nor will they grant it against justices acting in sessions, except in very flagrant cases. 1 W. Bl. 432.

So, against ministerial officers, for any act of oppression, or for any illegal act committed by them, in the execution of their duties, from corrupt, vindictive, or other improper motives, the court will grant a criminal information; see 4 Bur. 2106. Cald. 246; but not where they act from ignorance or mistake merely. See 1 Chit. Rep. 702. The court, however, have granted a criminal information against a person for refusing to take upon himself the office of sheriff, because the vacancy of the office occasioned an interruption of public justice, and the year would be nearly expired before an indictment could be brought to trial. 2 T. R. 731. See 2 Str. 1193, 1 Wils. 18.

The court, however, will not in general grant a criminal information for an illegal act, committed by a person under a *bona fide* conviction that he was merely exercising a legal right; 3 Barn. & Ald. 668; or where the application is made against a poor man residing at a distance, to whom it would be very inconvenient, if not impossible, to shew cause against the rule, or to appear afterwards to receive judgment if convicted. See Cald. 246. They have refused it, also, against the members of a corporation, for a misapplication of the corporation funds, it being rather a subject for an application to the Court of Chancery. 2 T. R. 199. They have refused it, for the misapplication of money collected on a brief; 1 W. Bl. 443; and for not collecting money on a brief. 2 Str. 1130. They have also refused to grant it, where it appeared that the party applying had suppressed some of the material facts of the case, and misrepresented others. 3 Bur. 1683. So, where an application for a criminal information was made, for raising great sums by subscription, for trading purposes, as being one of those schemes denounced by stat. 6 G. 1. c. 18 s. 18; the *court refused to grant it, as the [41] statute had not been acted upon for a great length of time, and

was now sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to an application to the court. 9 East, 516. So, the court refused an information for sending a challenge, when it appeared that the party applying, had previously written letters to the other, provoking him to fight; but the court said, that if both parties had applied for informations, they would have granted them. 1 Bur. 316. So, an information has been refused, where the application was made by notorious gamesters, against other gamesters, for a conspiracy to cheat them at a race. 1 Bur. 548. Even in cases which would warrant an information, if the court think that it will be sufficient punishment for the defendant to pay the costs already incurred by the prosecutor, they will discharge the rule *nisi*, upon those terms, if acceded to by the defendant. 1 Doug. 314. 426.

When and how to be moved for, &c.] The application is for a rule to shew cause why a criminal information should not be filed against the party complained of, and must be founded upon an affidavit disclosing all the material facts of the case. If the court grant the rule *nisi*, it is afterwards, upon shewing cause, discharged or made absolute, as in ordinary cases. It may be necessary to mention that the motion must be made by a barrister or serjeant; the court will not entertain the application, if made by a private individual. 1 Chit. Rep. 602.

The application must be made within a reasonable time, or the delay must be satisfactorily accounted for. The only exception to this, is, the case of bribery at parliamentary elections, a criminal information for which cannot be moved for, until after the two years have elapsed, within which an action may be brought for the penalties. See 1 W. Bl. 541. If the application be made against a magistrate for any thing done by him in the execution of his office, if the offence were committed in vacation, the motion must be made in the next term, if it be an issuable term, or, in the second term, if the first be not an issuable term; see 13 East, 270; but if the offence were committed in term time, the application may be made either in that term, or it should seem in the next, particularly if there be not a sufficient number of days remaining of the first term, to allow a reasonable time for the prosecutor to obtain his rule *nisi*, and for the defendant to shew cause against it. The application against a magistrate, if made in the same term in which the offence was committed, is allowed to be made at the latter end of the term; 7 T. R. 80; if made in another term, or if the offence were committed in vacation, it must be made so early in the term, as to afford sufficient *time for [42] him to shew cause against it during the same term. 13 East, 322. 7 T. R. 80. Before the court entertain an application for a criminal information against a magistrate, for convicting without having summoned the party, the conviction must be removed. 2 Str. 915. They have refused an information against a clergyman for perjury upon his admission to his living, until after he was convicted of the simony. 1 Str. 70. Nor will they grant an information for an attempt to suborn witnesses in a civil suit, while the action is pending, except in very clear cases. Hardw. 244.

The affidavit upon which the application is made, must disclose all the material facts of the case; if a material fact be suppressed or misrepresented, the court, we have seen, will discharge the rule, very probably with costs. Also, as the court in these cases are in a manner substituted for a grand jury, they will in general expect that the facts so disclosed shall amount to such evidence as would satisfy a grand jury, if an indictment were preferred for the offence. 6 T. R. 294. 3 Barn. & Ald. 583. If the subject of the application be a libel upon an individual, charging

him with a particular offence, the court always require the prosecutor to deny the charge upon oath, before they will grant the information; 1 Doug. 283, 284, 387; but if the charge be general, or if it relate to any thing said or supposed to have been said by the prosecutor in parliament as a member, it is otherwise. 1 Doug. 387. So, where a criminal information was applied for against a magistrate, for improperly convicting a person, the court refused to grant it, unless the party complaining would make an exculpatory affidavit denying the charge. 3 T. R. 388. The affidavit upon which the rule *nisi* is moved for, must not be intituled in any cause; the affidavits, upon shewing cause, are intituled, *the King* v. *the party complained of*. Str. 704. It may be necessary also to mention, that if it be intended to file a joint information against several persons, the application should be joint against all in the first instance; for where distinct rules were obtained against five persons severally, and one information thereupon filed against them jointly, the court, upon application, set aside the proceedings. 3 Bur. 1270.

Form of it.] The form of an information filed by the master of the Crown Office, is thus:—

Trinity Term, 3 *George* 4.

"*Middlesex: Be it remembered, that Edmund Henry Lushington, Esq. coroner and attorney of our Lord the now King, in the court of our Lord the King, before the King himself, who* **prosecutes for* [43] *our said Lord the King, in this behalf, in his proper person comes here into the court of our said Lord the King, before the King himself, at Westminster on* [Monday next after eight days of the Holy Trinity, in this same term,] *and for our said Lord the King, gives the court here to understand and be informed that*," &c. so proceeding to state the facts and circumstances constituting the offence, with the same certainty and precision, as in an indictment, and in the same form and according to the same rules, excepting that in introducing averments, instead of the words, "*And the jurors aforesaid, upon their oath aforesaid, do further present*," are used the words "*and the said coroner and attorney of our said Lord the King, who prosecutes as aforesaid, further gives the court here to understand and be informed, that*," &c. The conclusion is the same as in an indictment.

The second and subsequent counts commence thus: "*And the said coroner and attorney of our said Lord the King, who prosecutes as aforesaid, further gives the court here to understand and be informed, that*," &c. so proceeding to state the offence, and concluding as in an indictment. And to the conclusion of the last count, are added these words: "*And therefore the said coroner and attorney of our said Lord the King, prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said J. S. in this behalf, to make him answer to our said Lord the King, touching and concerning the premises aforesaid.*"

How filed, &c.] After the court have made the rule absolute, the information may be filed at the Crown Office, King's Bench Walk, Temple, upon the prosecutor's entering into the usual recognizances for costs. Formerly, the master of the Crown Office had the power of filing informations without any control; and being filed in the name of the King, they subjected the prosecutor to no costs, however groundless they turned out to be at the trial. But some abuses of this power, previously to the revolution, caused it shortly afterwards to be enacted, by stat. 4 & 5 W. & M. c. 18, that the master of the Crown Office, should not thereafter file any information without express direction from the court of King's Bench: and that every prosecutor, permitted to promote such in-

formation, should give security, by a recognizance of £20, conditioned to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the judge who tries the information, certify that there was reasonable cause for filing it; and, at all events, to pay costs unless the information shall be tried within a year after issue joined. The defendant, however, upon his acquittal, is not entitled to any costs, beyond the extent of this recognizance. 2 T. R. 145.

[44] **In what cases quashed.*] The court will very seldom quash an information filed by the master of the Crown Office; indeed, in some of the books, it is laid down that they will not quash it in any case. See 1 Str. 185. 1 Sid. 152. They have, however, interfered in this manner, in a very few cases, under particular circumstances. See 2 Str. 1072. 1 Bur. 385. If quashed on the motion of the plaintiff, it must be upon payment of costs, at least to the extent of the recognizance,

*CHAPTER III.

Pleas, Replications, &c.

SECT. 1. *Plea to the Jurisdiction.*
2. *Plea in Abatement.*
3. *General Issue.*
4. *Special Pleas in Bar.*
1. *Autrefois acquit.*
2. *Autrefois convict.*
3. *Autrefois attaint.*
4. *Pardon.*
5. *Demurrer.*
6. *Counterplea of Clergy.*

SECT. 1.

Plea to the Jurisdiction.

WHERE an indictment is taken before a court that hath no cognizance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged; 2 Hale, 236: as if a man be indicted for treason at the quarter sessions, or for a rape at the sheriff's tourn, or the like; Id.; or if another court have exclusive jurisdiction of the offence.

But although the defendant may plead to the jurisdiction in such a case, there are but few instances in which he is obliged to have recourse to such a plea. If the offence were committed out of the jurisdiction of the court, the defendant may take advantage of this matter under the general issue; see 6 East, 583; or if the objection appear upon the face of the record, he may demur, or, (it should seem) move in arrest of judgment, or bring a writ of error. If, on the other hand, the offence were committed within the jurisdiction of the *court, but [46] the court have not cognizance of it, (which can occur only in the case of indictments in inferior courts, such as the court of quarter sessions,) the defendant may have advantage of it upon general demurrer, 1 T. R. 316, or the Court of King's Bench, upon the indictment being removed by *certiorari*, will quash it, 2 Str. 1088; or the court, where the indictment is preferred, will in general give the defendant advantage of the objection, at the trial, under the general issue. As pleas to the jurisdiction, therefore, seldom occur, it is not necessary to treat of them here, at any length. The form of them is thus:—

"*And the said J. S., in his own proper person, cometh into court here, and having heard the said indictment read, saith that the court of our Lord the King here ought not to take cognizance of the* [trespass and assault] *in the said indictment above specified: because, protesting that he is not guilty of the same, nevertheless the said J. S. saith, that,*" [&c. so proceeding to

state the matter of the plea. See the precedents, 1 Went. 10. 18. 4 Went. 63. Conclude thus:] "*And this he the said J. S. is ready to verify; wherefore he prays judgment if the said court of our Lord the King now here will or ought to take cognizance of the indictment aforesaid, and that by the court here, he may be dismissed and discharged,*" &c. Then add profert of any letters patent which may have been set forth in the plea. The form is the same in the King's Bench, excepting that the court is described as "*the court of our said Lord the King, before the King himself here;*" and, in the case of informations, the words, "*having heard the said indictment read,*" are omitted. The plea must be verified by affidavit.

The form of the replication to this plea is thus: "*and hereupon J. N.*" (the clerk of the peace or clerk of arraigns,) "*who prosecutes for our said Lord the King in this behalf, says, that notwithstanding any thing by the said J. S. above in pleading alleged, this court ought not to be precluded from taking cognizance of the indictment aforesaid; because he says that,*" [&c. stating the matter of the replication.] "*And this he the said J. N. prays may be enquired of by the country, &c.*" Or if it conclude with a verification, then thus: "*And this he the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may answer to the said indictment.*" Where the plea is pleaded in the Court of King's Bench, the replication is in the name of the master of the Crown Office, in the case of an indictment or of an information filed by him; or in the name of the attorney general, in the case of informations *ex officio*. *See post, sect. 4 of this chapter.*

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[47] *SECT. 2.

Plea in Abatement.

If the indictment assign to the defendant no christian name, or a wrong one, no surname or a wrong one, or no addition or a wrong one, he may plead this matter in abatement. *Ante, p.* 9. Misnomer, however, is the only case in which a plea in abatement is at all usual in practice. The following is the form of a plea of misnomer:—

"And James Long, who is indicted by the name of George Long, in his own proper person, cometh into court here, and having heard the said indictment read, saith, that he was baptized by the name of James, to wit, at the parish aforesaid, in the county aforesaid, and by the christian name of James, hath always since his baptism hitherto been called and known; without this, that he the said James Long now is or at any time hitherto hath been called or known by the christian name of George, as by the said indictment is supposed: and this he the said James Long is ready to verify; wherefore he prayeth judgment of the said indictment, and that the same may be quashed, &c." *See* 10 *East*, 87.

This plea should be engrossed on parchment or paper, although it is said to have been decided that it may be pleaded *ore tenus*. 2 Leach, 535. Annexed to it must be an affidavit, (3 Bur. 1617,) intituled in the court and cause, to this effect:

"James Long, of ————, the defendant in this prosecution, maketh oath and saith, that the plea hereunto annexed is true, in substance and matter of fact."

It may be necessary to mention that, although usual, it is not essential that the plea should state that the defendant was *baptized* by such a name; saying that it is his name, and by that name he was always called and known, is sufficient. 6 Mod. 116. 1 Salk. 6. Hardw. 286. Com. Dig. Abatement, F. 17. A plea of misnomer of surname, may be easily

framed from the above. See a precedent, Cr. Cir. C. 46. See also a precedent of a plea of no addition of degree or mystery, Cr. Cir. C. 393; false addition of place of residence, 1 Went. 36.

The replication to this plea is in form thus:

"And hereupon J. N." (*the clerk of the peace, or clerk of the arraigns*), "who prosecutes for our said Lord the King in this behalf, saith that the said indictment, by reason of any thing by the said James Long, in his said plea above alleged, ought not to be quashed; because he saith that the said James Long, long before, and at the time of the preferring of the said indictment was, and still is, known as well by the name of George Long, as by the name of James Long, to wit, at the parish aforesaid, in the county aforesaid: and this he the said J. N. prays may be enquired of by the country, &c."

In general, however, instead of replying, it is better, if the grand jury be still sitting, to alter the *indictment, by substituting the name by which the defendant has pleaded, for the name in the indictment, and to have it preferred again and found, and the defendant again arraigned upon it; in which case, he will be estopped by his plea in abatement, from again pleading a misnomer. [48]

This issue is generally proved thus: the defendant gives in evidence his certificate of baptism, with evidence of identity, or proves by parole evidence, that he has always been called James and not George; and the prosecutor, on the other hand, proves that upon some occasion he has assumed the name of George, or that he has usually gone by that name. But it may be questioned, perhaps, whether the proof of this issue be not entirely on the prosecutor. It is said, indeed, to have been decided, that if a defendant allege in his plea, that he was *baptized* by a certain name, he will be held to strict proof of that fact; 1 Camp. 479. 1 Ph. Ev. 220; but this is a mistake; for even supposing the proof of the issue to be upon the defendant, he cannot be called upon to prove the inducement to his traverse, which is neither traversable nor traversed by the prosecutor.

The judgment for the defendant, upon a plea in abatement, is, that the indictment be quashed; See 10 East, 87; and, if the indictment were for a misdemeanor, he is immediately discharged; but if for felony or treason, he is remanded until a new indictment has been preferred. The judgment for the King, in misdemeanors, is final; in treason and felony, that the defendant do answer over.

Sect. 3.

General Issue.

The general issue is pleaded by the prisoner *viva voce* at the bar, in these words, "*not guilty;*" the clerk of the arraigns then asks him how he will be tried, and he answers "*by God and my country.*" But when the record is made up, the general issue appears upon it thus:

"And he the said J. S. forthwith being demanded, concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, saith that he is not guilty thereof; and thereof for good and evil he puts himself upon the country."

And the *similiter* is then added thus:

"And J. N." (*the clerk of the peace or clerk of arraigns,*) "who prosecutes for our said *Lord the King in this behalf, doth the like." [49]

Therefore let a jury come, &c., so proceeding with the award of the *venire.*

In informations, and in indictments for not repairing roads and bridges, &c., where the defendant is allowed, *ex gratia*, to appear by attorney, the general issue is regularly engrossed, and filed with the proper officer. It is in form thus :—

"And the said J. S., by A. B. his attorney, cometh into court here, and having heard the said indictment [*or* information] read, saith, that he is not guilty of the said premises in the said indictment [*or* information] above specified and charged upon him; and of this the said J. S. puts himself upon the country."

Afterwards, in making up the record, the *similiter* is added thus :—

"And J. N. who prosecutes for our said Lord the King in this behalf, doth the like,"

if it be pleaded to an indictment at the assizes or sessions; or if to an indictment in the King's Bench, then thus :—

"And Edmund Henry Lushington, Esquire, coroner and attorney for our said Lord the King, in the court of our said Lord the King, before the King himself, who prosecutes for our said Lord the King in this behalf, doth the like;"

or if to an information, then thus :—

"And the said attorney general, [*or* coroner and attorney] of our said Lord the King, who prosecutes as aforesaid, for our said Lord the King, doth the like."

The general issue makes it incumbent upon the prosecutor to prove every fact and circumstance constituting the offence, as stated in the indictment or information. On the other hand, the defendant may give in evidence, under this plea, not only every thing which negatives the allegations in the indictment, but also all matter of excuse and justification.

Sect. 4.

Special Pleas in Bar.

As all matter of excuse and justification may be given in evidence under the general issue, a special plea in bar seldom occurs in practice; in fact, the only instance, (with the exception of the pleas of *autrefois acquit*, &c., which shall be treated of in the several sections of this chapter,) in which a special plea in bar seems requisite in criminal cases, is, where a parish or county is indicted for not repairing a road or bridge, &c., and wishes to throw the onus of repairing upon some person or persons not bound of common right to repair it; in which case they must
[50] plead specially the *liability of the party to repair, and the reason of his liability, so as to take the case out of the common law rule, that every highway shall be repaired by the parish, and every bridge by the county in which it is situate. *See precedents of such pleas, post.* The following are the forms of special pleas in bar, replications, and rejoinders.

Special Pleas.

"And the said J. S., in his own proper person, cometh into court here, and having heard the said indictment, [*or* information] read, saith, that our said Lord the King ought not further to prosecute the said indictment against him the said J. S.; because he saith, that," [*&c., so proceeding to state the matter of the plea; and concluding thus:*] "And this he the said J. S. is ready to verify: wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.

Replication.

"And hereupon J. N." (*the clerk of the peace, or clerk of the arraigns*) "who prosecutes for our said Lord the King, in this behalf, says, that by reason of any thing in

the said plea of the said J. S. above pleaded in bar alleged, our said Lord the King ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says that," [&c , *so proceeding to state the matter of the replication : and concluding thus :*] " And this he the said J. N. prays may be enquired of by the country."

Or if it conclude with a verification, then thus :—

" And this he the said J. N. is ready to verify ; wherefore he prays judgment, and that the said J. S. may be convicted of the premises, in the said indictment above specified."

Where the plea is to an indictment in the King's Bench, the replication comes thus :—

" And hereupon Edmund Henry Lushington, Esquire, coroner and attorney of our said Lord the King, in the court of our said Lord the King, before the King himself, who prosecutes for our said Lord the King in this behalf, says, that by reason of," &c. &c. ;

and the conclusion thus :—

" And this the said coroner and attorney of our said Lord the King, prays," &c. &c., *as above.*

Where the plea is pleaded to an information, the replication is thus :—

" And the said Attorney General [*or* coroner and attorney] of our said Lord the King, who prosecutes as aforesaid, says, that by reason of" &c. &c. " And this the said *attorney general [*or* coroner and attorney] of our said Lord [51] the King, prays," &c. &c., *as above.*

If the replication conclude to the country, the *similiter* is then added, in making up the record : " *And the said J. S. doth the like :*" therefore let a jury come, &c., so proceeding with the award of the *venire.* But if the replication conclude with a verification, the defendant must then rejoin.

Rejoinder.

" And the said J. S., as to the said replication of the said J. N. to the said plea of him the said J. S., saith, that our Lord the King, by reason of any thing by the said J. N. in that replication alleged, ought not further to prosecute the said indictment against him the said J. S. ; because he saith, that," [*&c., so proceeding to state the matter of the rejoinder; and concluding thus :*] " And of this, he the said J. S. puts himself upon the country."

Or, if it be necessary to conclude with a verification, the conclusion may be in the same form as in a plea. *Vide supra.*

Having thus given the forms of special pleas, &c. generally, we shall now proceed to treat of those which usually occur in practice, in this order.

1. *Auterfois Acquit.*
2. *Auterfois Convict.*
3. *Auterfois Attaint.*
4. *Pardon.*

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1. *Auterfois Acquit.*

When a man is indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it ; and, if he be thus indicted a second time, he may plead *auterfois acquit*, and it will be a good bar to the indictment. The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried, is, whether the evidence necessary to support the second indictment, would have been sufficient to procure a legal conviction upon the first. 1 Brod. & Bing. 473. See this case, and see 9 East, 437.

Thus, an acquittal upon an indictment for burglary and larceny, [52] may be pleaded to an indictment for a larceny of *the same goods; because upon the former indictment, the defendant might have been convicted of the larceny. But if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny; see 2 Hale, 245; because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder, may be pleaded in bar of another indictment for manslaughter; Fost. 329. 2 Hale, 246; because the defendant might be convicted of the manslaughter on the first indictment. So, *auterfois acquit* of petit treason, is a good bar to another indictment for murder, and *è converso*, for the same reason. Fost. 325. 329. 2 Hawk. c. 35. s. 5. So, an acquittal upon an indictment for manslaughter, is, it seems, a bar to an indictment for murder. Fost. 329.

But an acquittal upon an indictment in a wrong county, cannot be pleaded to a subsequent indictment for the offence in another county. 4 Co. 45 a. 46 b. Com. Dig. Indictment, L. So, an acquittal upon an indictment for a felony, is no bar to an indictment for a misdemeanor, and *è converso*. 2 Hawk. c. 35. s. 5. An acquittal as accessary, is no bar to an indictment as principal, and *è converso*. 2 Hale, 244. Fost. 361. 2 Hawk. c. 35. s. 11. So, an acquittal upon an insufficient indictment, is no bar to another indictment for the same offence. 4 Co. 45 a. Where the defendant was formerly indicted for forging a will, which was set out in the indictment thus: "*I, John Styles*," &c., and was acquitted for variance, the will given in evidence commencing "*John Styles*," without the "*I:*" it was holden that he could not plead this acquittal in bar of another indictment, reciting the will correctly, "*John Styles*," &c. R. *v.* Cogan. 2 Leach, 503.

The following is the form of the plea of *auterfois acquit*:—

"And the said J. S. in his own proper person, cometh into court here, and having heard the said indictment read, saith, that our said Lord the King ought not further to prosecute the said indictment against the said J. S.; because he saith that heretofore, to wit, [*at the general quarter sessions of the peace, holden at*" — *so continuing the caption of the former indictment,—*"*it was presented, that the said J. S., (then and there, and thereby described, as J. S., late of* ———, *in the county aforesaid, labourer,) on the third day of*," &c., *continuing the indictment to the end; reciting it however in the past, and not in the present tense. Recite also the remainder of the record to the end of the judgment, in the past tense, in like manner. Then proceed thus:*] "As by the record thereof more fully and at large appears; which said judgment still re-
[53] mains in full force and effect, and not in *the least reversed, or made void. And the said J. S. in fact saith that he the said J. S., and the said J. S. so indicted and acquitted as last aforesaid, are one and the same person, and not other and different persons; and that the [*felony and larceny*] of which he the said J. S. was so indicted and acquitted as aforesaid, and the [*felony and larceny,*] of which he is now indicted, are one and the same [*felony and larceny,*] and not other and different [*felonies and larcenies.*] And this he the said J. S. is ready to verify: wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified"

If the indictment be for felony or treason, the defendant, besides this plea of *auterfois acquit*, should also plead over to the felony, &c. In such a case, therefore continue the plea thus:—

"And as to the felony and larceny of which the said J. S. now stands indicted, he the said J. S. saith that he is not guilty thereof; and of this he the said J. S. puts himself upon the country."

Where the offence is alleged in the two indictments to have been committed at different times, or places, they are nevertheless sufficiently identified by the above general averment, that they are one and the same

offence. But if one of the indictments appear to be for the murder of a person unknown, or for larceny of the goods of a person unknown, and the other for the murder of J. N., or for larceny of the goods of J. N.: the plea should also aver that the person so described as a person unknown, and J. N., are one and the same person, and not different persons. So, if one indictment be for the murder of J. N., or for larceny of the goods of J. N., and the other indictment be for the murder of J. G., or for larceny of the goods of J. G., the two offences may be identified by an averment that the said J. G. was known as well by the name of J. N. as J. G. See 2 Hawk. c. 35. s. 3. It may be necessary to observe, that the record of the former indictment and acquittal, must be set out in the plea; otherwise it will be bad upon demurrer. 1 M. & S. 183.

In the case of a plea of *auterfois acquit*, a jury are sworn instanter to try the issue; 2 Leach, 541; and therefore there is no replication actually pleaded upon the part of the crown. But a replication and similiter must be entered upon the record, when afterwards made up. The form may be thus:—

"And hereupon A. B." (*the clerk of the peace, or clerk of arraigns,*) "who prosecutes for our said Lord the King, in this behalf, says, that by reason of any thing in the said plea of the said J. S. above pleaded in bar alleged, our said Lord the King ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says, that there is not any record of the said supposed acquittal, in manner and form as the said J. S. hath above in his said plea alleged; and this he the said A. B. prays may be enquired of by the country. And the [54] said J. S. doth the like."

Therefore let a jury come, &c. Or instead of tendering an issue as to the record, the prosecutor may (it should seem) tender an issue as to the identity of the party. The replication concludes to the country, and no day is given to bring in the record, as in civil actions; because in criminal cases, there can be no trial by the record, it must be by jury only.

The proof of the issue lies upon the defendant. To prove it, he has merely to prove the record, in the manner pointed out hereafter, under the title evidence, Ch. 2. s. 3.; and secondly, to prove the averments of identity contained in his plea.

2. *Auterfois Convict.*

A man convicted of a clergyable felony, and who has prayed the benefit of clergy, may plead such conviction and prayer of clergy, in bar of any subsequent indictment, either for the felony of which he was convicted, or for any other clergyable felony committed by him previously to his conviction. See stat. 25 Ed. 3. c. 5. 8 El. c. 4. 18 El. c. 7. 2 Hawk. c. 36. This plea, like that of *auterfois acquit*, must set out the record of conviction to the allowance of clergy or judgment, inclusive, and must contain an averment either that the offences charged in the former indictment and in the present one, are one and the same offence, and not other and different, or that the felony charged in the present indictment was, (if at all) committed previously to the former conviction.

3. *Auterfois Attaint.*

If a man be attainted of treason or felony, he cannot, afterwards, whilst the attainder remains in force, be indicted for another felony, whether such other felony were committed before or after his attainder; because, being already attainted, and therefore dead in contemplation of law, and his property forfeited, a prosecution for any other offence would be useless. To this, however, there are some exceptions. Where the attain-

der is reversed for error, it cannot be pleaded; although it may be pleaded until actually reversed, however erroneous it may be upon the face of it: and secondly, where it is necessary to indict the defendant as principal in a felony, in order to bring the accessaries to justice, the former attainder is no bar. An attainder of felony, also, is no bar to an indictment for treason. Where an attainder is reversed by par-
[55] liament, or the judgment *vacated by the King's pardon, it may still be pleaded in bar of the felony of which the party was attainted, but not of felonies committed afterwards. See 2 Hale, 250, &c. 4 Bl. Com. 330.

The plea of *auterfois attaint* merely sets out the record, with an averment as to the identity of the defendant, and concludes in the usual form.

4. *Pardon.*

A pardon may be pleaded in bar to the indictment; or, after verdict, in arrest of judgment; or, after judgment, in bar of execution. But it must be observed, that it is necessary to plead it the first opportunity the defendant may have of doing so; for if, for instance, he have obtained a pardon before arraignment, and instead of pleading it in bar, he plead the general issue, he shall be deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment. 1 Ro. Rep. 297. Kel. 25. What has now been mentioned, however, relates to the King's charter of pardon only; for a statute pardon need not be pleaded, Fost. 43. Standf. 103 a. 3 Inst. 234. Plowd. 83, 84, unless there be exceptions in it; 2 Hale, 252. 3 Inst. 234; nor can the defendant lose the benefit of it by his own laches or negligence.

The plea must allege the pardon to be under the great seal. 1 B. & P. 199. See W. Bl. 479. 2 Id. 799. The letters patent are set out in it, with profert; and it concludes thus:—

"By reason of which said letters patent, the said J. S. prays that by the court here he may be dismissed and discharged from the said premises, in the said indictment specified."

If there be any variance in the description of the offence or party between the pardon and the indictment, it may be made good in the plea by averments of identity, in the same manner as in the plea of *auterfois acquit*. See ante, p. 53.

Sect. 5.

Demurrer.

A demurrer in criminal cases, seldom occurs in practice. The defendant seldom demurs to the indictment, because he may have the same advantage upon the plea of not guilty, or by motion in arrest of judgment, that he could have upon a demurrer; 2 Hale, 257; and because
[56] also it is matter of *doubt whether judgment against the defendant upon a demurrer to the indictment be not final, and not merely a judgment to answer over. A demurrer upon the part of the crown, also, is very unusual, as special pleas in fact seldom occur in practice. The following are forms of demurrers and joinders.

Demurrer to an Indictment or Information.

"And the said J. S., in his own proper person, cometh into court here, and having heard the said indictment [*or* information] read, saith that the said indictment [*or* information] and the matters therein contained, in manner and form as the same are

above stated and set forth, are not sufficient in law, and that he the said J. S. is not bound by the law of the land to answer the same: and this he is ready to verify. Wherefore, for want of a sufficient indictment, [*or* information] in this behalf, the said J. S. prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment [*or* information] specified."

Joinder.

"And J. N., who prosecutes for our said Lord the King, in this behalf, saith, that the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said J. S. to answer the same; and the said J. N., who prosecutes as aforesaid, is ready to verify and prove the same, as the court here shall direct and award. Wherefore, inasmuch as the said J. S. hath not answered to the said indictment, nor hitherto in any manner denied the same, the said J. N., for our said Lord the King, prays judgment, and that the said J. S. may be convicted of the premises in the said indictment specified."

The like form, *mutatis mutandis*, may be adopted in the case of informations, and of indictments in the court of King's Bench.

Demurrer to a Plea in Bar.

"And J. N., who prosecutes for our said Lord the King in this behalf, as to the said plea of the said J. S. by him above pleaded, saith, that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude our said Lord the King from prosecuting the said indictment against him the said J. S.; and that our said Lord the King is not bound by the law of the land to answer the same: and this he the said J. N., who *prosecutes as aforesaid, is ready to verify. Wherefore, for [56] want of a sufficient plea in this behalf, he the said J. N., for our said Lord the King, prays judgment, and that the said J. S. may be convicted of the premises in the said indictment specified."

The like forms, *mutatis mutandis*, may be adopted in the case of informations, and of indictments in the court of King's Bench.

Joinder.

"And the said J. S. saith, that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude our said Lord the King from prosecuting the said indictment against him the said J. S.; and the said J. S. is ready to verify and prove the same as the said court here shall direct and award. Wherefore, inasmuch as the said J. N., for our said Lord the King, hath not answered the said plea, nor hitherto in any manner denied the same, the said J. S. prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified."

A demurrer upon the part of the crown, or of the defendant, has the effect of laying open to the court, not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of law; Hob. 56, per Hobart. 1 Saund. 285 n. 5; and if two or more of the pleadings be bad in substance, the court will give judgment against the party who committed the first fault Thus, for instance, if the indictment be bad, there shall be judgment for the defendant, although the bar be also insufficient. 5 Co. 29 a. see Arch. Pl. & Ev. 319, 320. Or, even if it appear upon the face of the record, that the court have no jurisdiction of the offence charged in the indictment, the defendant may take advantage of this matter upon the demurrer. 1 T. R. 316.

Sect. 6.

Counterplea of Clergy.

Besides pleas in abatement, the general issue, and special pleas in bar, there were formerly what were termed declinatory pleas, namely, the plea of sanctuary, and the plea of clergy. The plea of sanctuary, however, is no longer in use, privilege of sanctuary having been
[58] abolished by stat. 21 Jac. 1. *c. 28; and the plea of clergy never occurs in practice, because it is more advantageous to the prisoner to pray clergy after, than to plead it before, conviction. Where clergy is pleaded, the crown answers by a replication; where prayed merely after conviction, the pleading upon the part of the crown, stating reasons why clergy should not be granted, is termed a counterplea of clergy.

Before we proceed to give the form of a counterplea of clergy, it may be necessary to notice the cases in which it may be pleaded. The benefit of clergy is allowed in all cases of felony, unless taken away by the express words of an act of parliament. 2 Hale, 330. In high treason, petit larceny, and misdemeanors, it was never allowed. Clergymen are entitled to it, as often as they offend; 2 Hale, 375; and consequently when a clergyman prays clergy, a counterplea of clergy cannot be pleaded. The only thing to be observed with respect to clergymen is, that to claim the benefit of clergy a second time, they must produce their orders. 4 Hen. 7. c. 13. But peers, peeresses, and lay commoners, are entitled to the benefit of clergy but once; and therefore, if they have been once convicted of a clergyable felony, and afterwards claim the benefit of clergy when indicted for felony a second time, the clerk of arraigns, or clerk of the peace, may plead in bar a counterplea of clergy. The counterplea may be in this form:—

"And J. N., who prosecutes for our said Lord the King in this behalf, (having heard J. S., who now here stands convicted of having unlawfully and feloniously, and against the form of the statute in such case made and provided, counterfeited one piece of copper money of this realm, called a farthing, prays the benefit of clergy, and of the statute in such case made and provided, to be allowed him in this behalf,) saith, that the said J. S. ought not to be allowed the said benefit of clergy, or of the statute in such case made and provided; because he saith, that heretofore, and before the committing of the said felony, by the said J. S., of which the said J. S. now stands convicted as aforesaid, to wit, [*at the general quarter sessions of the peace,*" &c., *so continuing to recite the record, from the caption of the indictment to the judgment, inclusive, as in the plea of* autrefois acquit. See Ante, p. 52. *Then continue the counterplea thus:*] "As by the record and proceedings thereof, more fully and at large appears: which said judgment still remains in full force and effect, not in the least reversed or made void. And the said J. N., who prosecutes as aforesaid, in fact saith, that J. S., who was so indicted and convicted, and to whom the benefit of clergy was so allowed, as last aforesaid, and the said J. S., who now here stands convicted as first aforesaid, are one and the same person, and not other and different persons.
[59] Wherefore, because the *said J. S. hath already been admitted to clergy, and allowed the benefit of the statute in such case made and provided, the said J. N., for our said Lord the King, prays judgment, and that he the said J. S., for the felony of which he now here stands convicted as first aforesaid, may receive judgment to die according to law."

The prosecutor must prove the substance of the counterplea: that is, he must prove the record of the former conviction, and allowance of clergy, in the manner pointed out hereafter under the title evidence; and prove the identity of the defendant, by parol evidence.

*PART II.

EVIDENCE, GENERALLY.

CHAPTER I.

What Allegations must be proved.

WHERE the defendant pleads the general issue, not guilty, the prosecutor is obliged to prove at the trial every fact and circumstance stated in the indictment, which is material, and necessary to constitute the offence. So, where the replication, or other pleading on the part of the prosecution, consists of a general traverse of the defendant's pleading, the defendant must prove the facts thus traversed and put in issue. See Arch. Pl. & Ev. 329, 330. The parts of a pleading, required to be thus proved, may be considered under the following heads :—

Time.] The day and year on which facts are stated in the indictment or other pleading to have occurred, are not in general material; and the facts may be proved to have occurred upon any other day previous to the preferring of the indictment. See Ante, p. 14. Holt, 301. 1 Salk. 288. 9 St. Tr. 587—605. 543—552. Fost. 7, 8. To this rule, however, there are these exceptions; namely, *First*, That in all cases where bills of exchange, promissory notes, or other written instruments, not under seal, are pleaded, the date, if stated, must correspond with the date of the instrument when produced in evidence at the trial; otherwise the variance will be fatal. 2 Camp. 307 n. See 4 Camp. 209. Arch. Pl. & Ev. 331, 332. *Secondly*, as deeds may be pleaded either according to the date which they bear, or to the day on which they were delivered, (Arch. Pl. & Ev. 100), if a deed produced in evidence, bear date on a day different from that stated in the pleading, the party producing it must prove that it was in fact delivered on the day alleged in the pleading, *otherwise the variance will be fatal. *Thirdly*, if any [61] time stated in a pleading, is to be proved by matter of record, the slightest variance between the time so stated, and that appearing from the record when produced, will be fatal. See 1 T. R. 656. 4 T. R. 590. 11 East, 508. 2 Saund. 291 b. 1 H. Bl. 49. *Fourthly*, when the precise date of any fact is necessary to ascertain and determine with precision the offence charged, or the matter alleged in excuse or justification, any the slightest variance between the pleading and evidence in that respect will be fatal. See Arch. Pl. & Ev. 332. And, *lastly*, in burglary, and house-breaking (on stat. 39 El. c. 15), the former must be proved to have been committed in the night time, the latter to have been committed in the day time, although the day on which the offence is charged to have been committed is immaterial, and it may be proved to have been committed on any other day previous to the preferring of the indictment. In murder, also, the death must be proved to have taken place within a year and day from the time at which the stroke is proved to have been given.

Place.] It is not necessary to prove that the facts stated in the indictment or other pleading, occurred in the parish or place therein alleged; it is sufficient to prove that they occurred within the county or other extent of the court's jurisdiction. 2 Hawk. c. 25. s. 84. Ante, p. 14. But they must be proved to have been committed within the county, or other extent of the court's jurisdiction, otherwise the defendant must be acquitted. And where a forged bill of exchange was found upon J. S., who resided in Wiltshire, and had resided there about a year, under a false name, but which bill bore date more than two years previously to its being found upon him, and at a time when he lived in Somersetshire: on an indictment against him for a forgery of the bill in Wiltshire, this was holden not to be sufficient evidence of the offence having been committed in that county. R. *v.* Crocker. 2 New Rep. 87.

To the above rule, as to the parish and place being immaterial, there are, however, these exceptions; namely, First, that if the statute upon which the indictment is framed, give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment. *Secondly*, upon an indictment against a parish for not repairing a road, the part of a road out of repair, must be proved to be within the parish; and the same in all other cases, in which the place where the fact occurred is a necessary ingredient in the offence. *Thirdly*, if a place mentioned in pleading be stated, as part of the description of a written instrument, or is to be proved by matter of record, any the slightest variance [62] *between the place as stated, and that appearing from the written instrument or record when produced, will be fatal. See 9 East, 188. 4 Taunt. 700. 671. 6 Taunt. 394. 2 Camp. 5 n. 274. *And, lastly*, where the place is stated as matter of local description, and not as venue merely, the slightest variance between the description of it in the indictment and the evidence, will be fatal. Thus, for instance, in an indictment for stealing in the dwelling house, &c. for burglary, arson, shooting into a house with intent to kill, or for forcible entry, or the like, if there be the slightest variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, the defendant must be acquitted. The rule is the same, in this respect, in criminal cases, as in civil actions. And where, in an action for non-residence, the parish was styled in the declaration *St. Ethelburg*, and the real name appeared in evidence to be *St. Ethelburga*, it was holden a fatal variance. 2 B. & P. 281. So, in an action for a nuisance in erecting a weir, if it be described in the declaration to be at H., and be proved to be at a lower part of the same water, called T., the variance is fatal. 2 East, 500. In trespass for breaking and entering a house, situate in the parish of Clerkenwell, it appeared at the trial that there were two parishes in Clerkenwell, namely, *St. James's* and *St. John's*, and that the house was situate in the former; and Gibbs, C. J., nonsuited the plaintiff for this variance. 1 Holt, 523. But where, in ejectment, the premises were laid to be in *Farnham*, and proved to be in *Farnham Royal*, it was holden not to be a fatal variance, unless it were shewn that there were two *Farnhams*. 13 East, 9. See Arch. Pl. & Ev. 333.

Also, if it appear in evidence, that there is no such place within the county, as that where a treason or felony is alleged in the indictment to have been committed, it should seem that the defendant must be acquitted; the stat. 9 Hen. 5. st. 1. c. 1. enacts, that the indictment in such a case shall be void.

The offence charged.] Every offence consists of certain acts done, or omitted, under certain circumstances; all of which must be stated in the indictment (see *ante*, p. 15,) and be proved as laid; any material variance between the fact laid and the fact proved, will be fatal. Thus, for instance, where in an indictment for obtaining money by false pretences, the false pretence stated was that the defendant said that *he had paid* a sum of money into the bank, and the proof was that he said that a sum of money had been paid into the bank, without saying by whom; the defendant was acquitted for the variance, Lord Ellenborough holding that there was a difference in substance between the two assertions. R. *v.* Plestow, 1 Camp. 494. *In an indictment for larceny, the [63] evidence must correspond strictly with the indictment, as to the species of goods stolen; as, for instance, an indictment for stealing a pair of shoes, cannot be supported by evidence of a larceny of a pair of boots. Where an indictment on stat. 15 G. 2. c. 34. and 14 G. 2. c. 6. (which make it felony without benefit of clergy to steal any cow, ox, heifer, &c.) charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was holden to be a fatal variance; for the statute having mentioned both cow and heifer, proved that the words were not considered by the legislature as synonymous. R. *v.* Cooke, 2 East, P. C. 617, Leach, 123. see also 1 Camp. 212. But a variance in the number of the articles, or in their value, is immaterial, provided the value proved be sufficient to constitute the offence in law. So, if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more, it will be sufficient, although he fail in his proof of the rest. In an indictment for larceny, also, the property in the goods must be strictly proved as laid; that is, the person whose goods they are alleged to be, must be proved to be either the actual owner, or the bailee, of them. See ante, p. 10. Even where an indictment for burglary charged the defendant with breaking and entering the house of J. D., with intent to steal the goods of J. W., and it appeared in evidence that no goods of any person of the name of J. W. were in the house, but that the name of J. W. had been inserted in the indictment by mistake, the judges held that the variance was fatal, and the defendant was accordingly acquitted R. *v.* Jenks, 2 East, P. C. 514. So, if it appear in evidence that the alleged owner of the goods is a feme covert, the defendant must be acquitted, 1 Hale, 513, for they are, in law, the goods of her husband. So, if a burglary be alleged to have been committed in the house of J. G., and it turn out in evidence to be the dwelling house of J. S., the defendant must be acquitted for the variance. Leach, 286. So, if a larceny be alleged to have been committed in the house of J. G., and it turn out in evidence to be the dwelling house of J. S., the defendant must be acquitted of the stealing in the dwelling house, and found guilty of the simple larceny merely. So, in all other cases, a material variance between the indictment and evidence, in the name of the party injured, will be fatal, and the defendant must be acquitted. Or if he be described as a person to the jurors unknown, and it appear in evidence that his name is known, the defendant will be acquitted. See 3 Camp. 264. 1 Holt, 595. And where, in an indictment for receiving stolen goods, the principal felon was described as a person to the jurors unknown, but it appeared in evidence that he was known, the receiver was acquitted for the variance. R. *v.* Walker, 3 Camp. 264.

Sums of money stated in an indictment, need not be proved *as [64] laid, see R. *v.* Gilham, 6 T. R. 265, unless they form part of

the description of a written instrument, or the exact sum be of the essence of the offence.

Records produced in evidence, must be strictly conformable with the statement in the pleading they are intended to prove; the slightest variance in substance between the matter set out and the record produced in evidence, will be fatal. The rule in criminal cases in this respect, is the same as in civil actions. See Arch. Pl. & Ev. 338, and the authorities there cited. Thus, in an action for a malicious prosecution, the declaration having stated that the indictment afterwards, to wit, on the 25th day of Feb. 1791, came on to be tried, and by the record when produced the trial appeared to have been on a different day, the plaintiff was nonsuited, although the day was laid under a *videlicet*. 4 T. R. 590. cont. 9 East, 157. Acc. 11 East, 508. 2 Saund. 291 b. So, an allegation that the plaintiff was acquitted by a jury in the court of our Lord the King, before the King himself at Westminster before the chief justice, and discharged thereupon by the court, was holden not to be proved by a record stating the trial to have been at *nisi prius*, and the plaintiff to have been discharged by the court in bank, 2 Camp. 193, 11 East, 508. So, where the return of a writ was laid to be in the 25th year of the King's reign (under a *videlicet*,) and the writ itself appeared to be returnable in the 24th year, the court held the variance to be fatal. 1 T. R. 656. But where an indictment for perjury stated that a certain cause (in which the perjury was alleged to have been committed) was tried at the assizes before E. W. one of the judges, &c., it was holden to be proved in substance by the *nisi prius* record, which stated in the usual form that the cause was tried before the two justices of assize, one of whom was E. W. 14 East, 218 n. see 1 T. R. 237 n. 240 n.

Where the matter of a written instrument is introduced in a pleading by the words "*according to the tenor following*," or "*of the tenor following*," or "*in the words and figures following*," or "*the words and matter following*," or in fact any other words which imply that a correct recital is intended, see ante. p. 20, 21, any the slightest variance between the instrument set out and that produced in evidence, is fatal, 2 East, P. C. 976. and see Id. 961, even although the pleader need not have set out more than the substance of the instrument in that particular case. A mere literal variance, however, (that is, where the omission or addition of a letter does not alter or change a word so as to make it another word. 2 Salk, 661. Cowp. 229,) will not be material; as, for instance, "receiv**e**d" for "reiceved," Leach, 145, 2 East, P. C. 977, "undertood" for "understood," Cowp. 229, or the like. On the other hand, if the matter of a written instrument be introduced by words which imply that the substance only, and not the very words, of the instrument
[65] *is set out, as, for instance, by the words "in substance as follows," 3 Barn. & Ald 503, or "to the effect following," 2 Salk. 417, or "in manner and form following," 1 Doug. 193, Leach, 227, or the like; if the instrument produced in evidence be in substance the same with that set out, it will be sufficient.

If a written instrument be described in pleading, as *purporting* to be so and so, the instrument when produced in evidence must appear upon the face of it to be what it is described in the pleading as purporting to be, otherwise the variance will be fatal, and may be taken advantage of at the trial, or (if the instrument be also set out verbatim in the pleading) the opposite party may demur, or bring a writ of error. As, for instance where the instrument was described in an indictment, as "a certain pa-

per writing purporting to be a bank note," and the note produced, though made to resemble, varied materially in its form from, a real bank note, the defendant was acquitted. R. *v.* Jones, 1 Doug. 300. So, where a bill of exchange was described in an indictment as " purporting to be directed to one J. King, by the name and description of J. Ring," the judgment was arrested ; for if it were really directed to J. Ring, it could not purport (that is, appear upon the face of it) to be directed to J. King. R. *v.* Reading, 1 East, 180 n. Leach, 672. Where words are the gist of the offence, and consequently set out in the indictment, they must be proved strictly as laid ; if there be any material variance between the words proved and those laid,—even if laid as spoken in the third person and proved to have been spoken in the second, 4 T. R. 217, or laid as spoken affirmatively, and proved to have been spoken by way of interrogation, 8 T. R. 150, or the like ;—the defendant must be acquitted. But if some of the words be proved as laid, and the words so proved be sufficient to constitute the offence for which the defendant is indicted, failing to prove the remainder of the words will not be material. The rule is the same as in civil actions for defamation. See 2 W. Bl. 790. 2 Barn. & Ald. 756 7 Taunt. 205. Where words are laid as an overt act of treason, it is sufficient to prove that the words really used were the same in substance as those laid, for the reason mentioned ante, p. 21.

It has already been observed, that the intention of the party at the time he commits an offence, is often an essential ingredient in it ; and in such cases it is as necessary to be proved, as any other fact or circumstance laid in the indictment. The intention, however, is not capable of positive proof ; it can only be implied from overt acts. Therefore, if it cannot be implied from the facts and circumstances which, together with it, constitute the offence, other acts of the defendant, from which it can be implied to the satisfaction of the jury, must be proved at the trial. See 6 East, 464.

If a man be charged with an offence, as principal in the first *de- [66]
gree, evidence of his being principal in the second degree will support the indictment ; and *è contra :* as, for instance, if A. and B. be indicted for murder, and the indictment charge that A. gave the mortal stroke, and that B. was present aiding and abetting ; evidence that B. gave the mortal stroke, and that A. was present aiding and abetting, will support the indictment. Fost. 351. 9 Co. 67 b. Plowd. 98. Also, in conspiracies, and even in high treason when it consists of a conspiracy, not only the acts of the defendant himself, but also all the acts of his accomplices done in furtherance of the common object, no matter where committed, may be given in evidence against him. R. *v.* Hardy, East, P. C. 98, 99. R. *v.* Tooke, Id. 98. As a foundation for such evidence, however, the existence of the conspiracy must first be proved ; 2dly, evidence must be given to connect the defendant with the conspirators ; and, 3dly, it must be proved that the person, whose acts are about to be given in evidence, was connected with the defendant in the same conspiracy. See R. *v.* Lovat, 9 St. Tr. *670, &c.

In indictments upon statutes, we have seen (ante, p. 25,) that where an exception or proviso is mixed up with the description of the offence, in the same clause of the statute, the indictment must shew, negatively, that the party, or the matter pleaded, does not come within the meaning of such exception or proviso. These negative averments seem formerly to have been proved in all cases by the prosecutor ; but the correct rule upon the subject seems to be, that in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his

knowledge, the negative is not to be proved by the prosecutor, but on the contrary, the affirmative must be proved by the defendant, as matter of defence: but, on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but on the contrary, either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge, as within the knowledge of the defendant, the prosecutor must prove the negative. Thus, informations upon the game laws must negative the defendant's qualification to kill game: but this negative need not be proved upon the part of the prosecution; on the contrary, the defendant must prove the affirmative of it, as matter of defence. R. *v.* Turner, 5 M. & S. 206. On the other hand, upon an indictment on stat. 42 G. 3. c. 107. s. 1., which makes it felony to course deer in an inclosed ground, without the consent of the owner,—that the deer were coursed *without the consent* of the owner, must be proved upon the part of the prosecution. See. R. *v.* Rogers, 2 Camp. 654.

Where a statute takes away the benefit of clergy from a common law felony, if committed under certain circumstances; if, upon an in-
[67] dictment under the statute, the prosecutor *prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common law felony only. So, if a misdemeanor at common law be made additionally penal by statute, if committed under certain circumstances, the defendant shall be convicted of the misdemeanor at common law, if the prosecutor succeed in proving the commission of the offence, but fail in proving that it was committed under the circumstances specified in the statute. 2 Hale, 191, 192. Upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. See 2 L. Raym. 886. Upon an indictment for high treason, proof of any one overt act is sufficient, provided the overt act so proved, be a sufficient overt act of the treason laid in the indictment. 1 Hale, 122. Fost. 194. 2 Hawk. c. 46. s. 35. In larceny, if any one of the articles enumerated in the indictment, of a sufficient value, be proved to have been stolen by the defendant, it is sufficient. See ante, p. 22. 63. So, in all other cases, if the facts and circumstances which constitute the offence, be proved, all beyond may be rejected as surplusage. As, for instance, where the defendant was charged in the indictment with having committed arson in the night time, and it was proved that he committed it in the day time, he was convicted, and the conviction was holden good by the judges. R. *v.* Mipton, 2 East, P. C. 1021. So, if a man be indicted for robbery near the highway, R. *v.* Wardle, 2 East, P. C. 785, or in a dwelling house, R. *v.* Pye, & R. *v.* Johnson, Id., and the prosecutor prove the robbery, but fail in proving it to have been committed near the highway or in the dwelling house, the defendant shall nevertheless be convicted; for robbery is a felony without benefit of clergy, wherever committed. But if the essential ingredients in an offence be stated in an indictment with greater particularity than is necessary, the unnecessary allegations used in the description of such ingredients cannot be rejected as surplusage, but must be proved as laid. See ante, p. 19.

Matter of defence, &c.] Matter of defence, when given in evidence under the general issue) and which is almost invariably the case, see ante, p. 49,) is proved by parol evidence, or by records or other written evidence, according to the rules laid down in the next chapter; when pleaded, and put in issue by the replication, it is also proved in the same manner, but

subject to the same rules as to variance, that have just now been laid down with respect to indictments. And the same, as to matter of replication, &c.

Matter not alleged, in what cases.] The general rule upon this subject, in criminal as well as civil cases, is, that nothing *shall [68] be given in evidence, which does not directly tend to the proof or disproof of the matter in issue. There is, in fact, no exception to this rule, in criminal cases, although there are certainly some cases which seem to be so. In high treason, by stat. 7 & 8 W. 3. c. 3. s. 8, no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment; yet this does not prevent overt acts not laid, from being given in evidence, if they be direct proof of any of the overt acts which are laid; R. *v.* Rookwood. 4 St. Tr. 661, 697, Holt, 683, 685. and see 4 St. Tr. 722, 731 6 Id. 282, 284. Fost, 9. 22. R. *v.* Watson, 2 Stark. 134; and if any one overt act be proved against the defendant in the proper county, acts of treason tending to prove such overt act, though done in a foreign county, may be given in evidence. Fost. 9. 22. 8 St. Tr. 218. 9 Id. 580. 558—562. 4 Id. 627, 655. 6 Id. 292. 8 Mod. 91. Or if the treason consist of a conspiracy, any act of the defendant's accomplices, done in furtherance of the common design, although not laid as an overt act in the indictment, may be given in evidence, provided it be direct proof of an overt act laid. R. *v.* Hardy, 1 East, P. C. 98, 99. So, in ordinary cases of conspiracy, acts done by some of the conspirators in the county in which the offence is laid, being proved, acts done by others of the conspirators in other counties may be given in evidence. R. *v.* Bowes, 4 East, 171 n. And in an indictment against persons for a conspiracy to carry on the business of common cheats, evidence was admitted, of the defendants having made false representations to other tradesmen, besides those named in the indictment. R. *v.* Roberts, 1 Camp. 400. In R. *v.* Hunt and others, 3 Barn. & Ald. 566, upon an indictment for conspiring and unlawfully meeting for the purpose of exciting disaffection and discontent among his Majesty's subjects at Manchester, it was holden that the previous conduct of a portion of the assembly, in training, &c. and in assaulting persons whom they called spies, was competent evidence as to the general character and intention of the meeting, although the effect of it as to each particular defendant was a distinct matter for the consideration of the jury. It was also holden, that it was competent to shew, as against *Hunt*, (who, though a stranger except by political connexion, had been invited to preside as chairman at the meeting,) that at a similar meeting in another place, holden for an object professedly similar, certain resolutions had been proposed by that person; it being in its nature a declaration of his sentiments and views on the particular subject of such meetings, and of the topics there discussed. But the court held that evidence of the misconduct of the military and others, in the subsequent dispersion of the meeting, was properly refused by the judge at the trial, as irrelevant, and having no bearing upon the intention and objects of the meeting, which intention and objects obviously existed *previously to the alleged misconduct of the military, [69] attempted to be given in evidence.

Where a guilty knowledge upon the part of the defendant, is to be proved, the prosecutor is allowed to give in evidence other instances of his having committed the same offence for which he is now indicted. As, for instance, upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner, at other times,

before or after the commission of the offence for which he is indicted, in order to prove, or at least to raise a presumption of, his knowledge that the note in question was forged. R. *v.* Wylie, 1 New Rep. 92. R. *v.* Tattersall, Id. 93 n. So, upon an indictment for uttering counterfeit money, it is competent to the prosecutor to prove that other pieces of such counterfeit money were found upon the defendant, or were uttered by him at different times. Id. 95.

And nearly the same rule applies, where it is requisite for the prosecutor to prove malice upon the part of the defendant. As, for instance, upon an indictment for murder, former attempts of the defendant to assassinate the deceased, would not only be receivable in evidence, but would be very strong presumptive proof of malice prepense. So, for the same reason, former menaces of the defendant, or expressions of vindictive feeling towards the deceased, or in fact the existence of any motive likely to instigate him to the commission of the offence in question, are also in such a case receivable in evidence. In a civil action for defamation, the plaintiff is always allowed, in order to prove the malice of the defendant, to give in evidence other words spoken by the defendant, besides those set out in the declaration; 2 Stark. 457. 1 Camp. 49; and the same, in actions for libel. Peake, N. P. C. 74. 166.

Upon an indictment for a rape, the defendant may give general evidence of the woman's character for want of chastity, or he may prove that she had before been criminally connected with him, but not that she had been criminally connected with others; R. *v.* Hodgson, 1 Ph. Ev. 190; and the same, upon an indictment with intent to commit a rape. 2 Stark. 243. Upon an indictment for libel, the defendant has been allowed to give in evidence such other parts of the same publication, as were fairly connected with the libel in question, and upon the same topic, in order to disprove the motive imputed to him by the indictment, and to shew the fair construction that should be put upon the passages therein set out. R. *v.* Lambert & Perry, 2 Camp. 398. And in Horne Tooke's case (1 East, P. C. 31,) it being proved upon the part of the prosecution that the defendant had distributed several publications advocating republican principles, and which was offered in evidence in order to
[70] induce a presumption that parliamentary reform (which *was expected to be set up by the prisoner in his defence) was a mere pretext to cover his treasonable purposes: the defendant, in order to rebut that presumption, was allowed to give in evidence a book upon parliamentary reform, written by him and published twelve years before.

The prisoner also will be allowed to call witnesses to speak generally as to his character, but not to give evidence of particular actions, unless such evidence tend directly to the disproof of some of the facts put in issue by the pleadings.

The several cases now mentioned, when carefully considered, will be found to be, not exceptions to, but rather illustrations of, the rule above mentioned, namely, that nothing shall be given in evidence, which does not tend directly to the proof or disproof of the matter in issue. In most of them, the evidence admitted tended directly to the proof of the knowledge or intention of the defendant at the time of the commission of the offence, and which was a material ingredient in the crime imputed to him. In the case of rape, above mentioned, the evidence tended to shew the great improbability of any resistance upon the part of the woman, and also, that the woman was not entitled to credit as a witness. As to evidence of the defendant's character, it can be of avail only in doubtful cases: where the probabilities of the defendant's guilt on the one side,

and the probabilities of his innocence on the other, are nearly equal, satisfactory testimony as to his general good character for honesty or humanity, may have the effect of raising a well founded presumption in the minds of the jurors, that a man of such a character could not have been the perpetrator of the larceny or murder imputed to him; and in this sense it may be deemed evidence tending to the disproof of the matter in issue.

Where the offence is stated in general terms in the indictment, as, for instance, where the defendant is indicted as a common barretor or common scold, or for keeping a common gambling house, or bawdy house, (see ante, p. 15) the prosecutor is allowed of course to give evidence of all the particular facts which constitute the offence thus generally stated in the indictment.

*CHAPTER II.

The Manner of Proving the Matters put in Issue.

EVIDENCE may be classed under three heads: admissions or confessions, presumptions, and proofs. These we shall consider fully, in the several sections of this chapter. But before we enter into a particular consideration of the subject, it may be necessary first to notice one or two rules relating to evidence generally.

First, It is a general rule, that the best evidence the nature of the case will admit of, must be produced, if it be possible to be had; but if not possible, then the next best evidence that can be had shall be allowed.

For if it appear that there is any better evidence existing than that which is produced, the very non-production of it creates a presumption that, if produced, it would have detected some falsehood which at present is concealed. 3 Bl. Com. 368. Gilb. Ev. 16. 1 Show. 397. Carth. 220. Holt, 284. 1 Salk. 281. 3 East, 192. See Arch. Pl. & Ev. 353—357. Therefore, before secondary evidence is offered, a foundation for it must first be laid, by proving that better evidence cannot be obtained. Thus, for instance, the best evidence of the contents of a deed or other written instrument, is the written instrument itself; secondary evidence, a copy, or parol evidence of the contents of the original. Therefore, before a copy of a written instrument, or parol evidence of its contents, can be received as proof, the absence of the original instrument must be accounted for, by proving that it is lost or destroyed, or that it is in the possession of the opposite party.

Records, however, are seemingly an exception to this rule, for they are proved by exemplifications or other copies, in all cases, unless they be records of the court in which they are to be produced, and the matter of record form the gist of the pleading to be proved. This exception has been adopted from necessity; requiring the record itself to be given in evidence, would be productive of great inconvenience, for it probably might be wanted for that purpose in several parts of the kingdom at the same time; besides, by removing it from the place in which it was deposited, there would necessarily be great danger of its being lost. Gilb. Ev. 7, 8. For the same reasons, journals of the house of lords, or house of commons,—a bill, answer, depositions, and decree in equity,
[72] in most *cases,—libel, answer, depositions, &c. in the ecclesiastical and admiralty courts, in most cases,—the rolls of a court baron, and other inferior courts,—parish registers—entries in corporation books, or the books of public companies, relating to things public and general,—may all be proved by copies.

When the copy of a document, (the document itself not being evidence at common law,) is made evidence by act of parliament, a copy must be produced; the original is not made admissible evidence by implication. 2 Camp. 121 n.

Where a written instrument is in the hands of the opposite party, it is necessary to serve him or his attorney with a notice to produce it; and if he do not produce it at the trial, in pursuance of the notice, then, upon proving the service of the notice, you will be allowed to give secondary evidence of its contents. The rule in this respect is the same

in criminal as in civil cases. 2 T. R. 201 n. But in cases where the nature of the pleading gives sufficient notice to the defendant of the subject of inquiry, so that he may prepare himself to produce the written instrument, if necessary, for his defence, a notice to produce it is not required: thus, for instance, it has been holden that, in trover for a bond, the plaintiff may give parol evidence of it, to support the general description of it in the declaration, without having given the defendant previous notice to produce it. How *v.* Hall, 14 East, 274. So, upon an indictment for stealing a bill of exchange, parol evidence of it was admitted, without a notice to produce it. R. *v.* Aickles, 1 Leach, 330. So, upon an indictment for administering an unlawful oath, where it appeared that the defendant read the oath from a paper, parol evidence of what the defendant in fact said, was holden to be sufficient, without giving him notice to produce the paper. 6 East, 421. So, where a seditious meeting came to certain resolutions, and the defendant, who was chairman, gave a copy of these resolutions to another person, it was holden that this copy might be given in evidence, without a notice to produce the original. R. *v.* Hunt, 3 Barn. & Ald. 566. In the same case, it was also holden that it was not necessary to produce or account for banners bearing certain inscriptions, &c. exhibited at such meeting, but that parol evidence of such matters, by eye witnesses, was perfectly admissible to shew the general character and intention of the assembly. Id. See 1 Arch. Pr. B. R. 149.

Secondly, It is a general rule that hearsay is no evidence; and for two reasons: what the other person said, was not upon oath; and the party who is to be affected by it, had no opportunity of cross-examining him. Gilb. Ev. 149. To this rule, however, there are some exceptions, arising from necessity: 1. *Hearsay* is admissible to prove the death of a person beyond sea; Bul. N. P. 294. 15 East, 293.—2. Hearsay is good evidence to prove a prescription, Bul. N. P. 295, or custom, 14 *East, 327 n. 12 East, 62, and for this purpose elderly witnesses [73] are usually called to prove what they heard in their youth from elderly persons upon the subject;—3. What a witness has been heard to say at another time, may be given in evidence, in order to invalidate or confirm the testimony he gives in court; 2 Hawk. c. 46. s. 14. Gilb. Ev. 150;—4. Upon an indictment for murder, the dying declarations of the deceased are receivable in evidence, if it appear that he was conscious of his being in a dying state at the time he made them. 1 Str 499. 1 East, P. C. 357. 2 Leach, 566. 638. And where two such declarations were made, the second of which alone was reduced into writing, in the presence of a magistrate, this written declaration not being forthcoming at the trial, the judges held that, in the absence of it, the first declaration was admissible evidence. R. *v.* Reason and Tranter. 1 Str. 489. The dying declarations of an accomplice are also holden admissible in evidence, R. *v.* Tinckler, 1 East, P. C. 354, 356, provided he were at the time such a person as would be competent as a witness. R. *v.* Drummond, 1 East, P. C. 353, 1 Leach, 378.

Having thus noticed these two general rules, we shall now proceed to consider the remainder of this part of our subject, under the following heads:

SECT. 1. *Admissions and Confessions.*
2. *Presumptions.*
3. *Written Evidence.*
4. *Parol Evidence.*

Sect. 1.

Admissions and Confessions.

In what cases.] The admission or confession of a fact by the defendant, renders it unnecessary for the prosecutor to prove it. 2 Hawk. c. 46. s. 31. See 1 Leach, 349 n. 2 Id. 625. 728. This admission or confession, is of four kinds:—

1. Where the defendant in open court confesses that he is guilty of the offence with which he is charged in the indictment. After this, a trial is unnecessary; and the court have nothing to do but to award judgment. The court, however, are usually very backward in receiving and recording such a confession; and will generally advise the prisoner to retract it, and plead to the indictment. 2 Hale, 225.

[74] *2. Where the defendant, upon an indictment for a misdemeanor, yields himself to the King's mercy, and desires to submit to a small fine; which submission, the court may accept of if they think fit, without putting the defendant to a direct confession. 2 Hawk. c. 31. s. 3.

3. Where the defendant, upon his examination before justices of the peace, on a charge of manslaughter, or other felony, under stat. 1 & 2 Ph. & M. c. 13. s. 4, 2 & 3 Ph. & M. c. 10, or, at common law, on a charge of any other offence, admits either his guilt, or any fact which may tend to prove it at the trial. This examination must not be upon oath; 1 Hale, 585; if it be, the court will not allow it to be given in evidence; and where it was in writing, and purported to have been taken upon oath, Le Blanc, J. even refused to admit parol evidence to prove that the prisoner, at the time of his examination, was not in fact sworn. R. *v.* Smith, & al. 1 Stark. 242.

4. Where the defendant makes an admission or confession of his guilt, or of any fact which may tend to the proof of it, to any other person; and declarations of a defendant, though made as a witness before a committee of the house of commons, and under compulsory process, were holden by Abbot, C. J., in R. *v.* Merceron, (2 Stark. 366,) to be admissible against the defendant, upon an indictment for corruptly granting licenses to public houses.

All these several species of confession, to be of effect, must be voluntary. And in the case of a confession before a magistrate or other person, if it appear that the defendant was induced to make it by any promise of favour, or by menaces, or undue terror, it shall not be received in evidence against him. 2 Hale, 285. See 2 Leach, 636 n. 1 Leach, 299. 327. So, if the promise or menace, &c. take place previously to the prisoner's being brought before the magistrate, and the confession be before the magistrate, the court will in general refuse to admit the confession to be given in evidence, unless it appear that the prisoner was undeceived by the magistrate, and cautioned by him not to expect the favour, or not to regard the menaces, held out to him. 2 East, P. C. 658, and see 1 Ph. Ev. 113. The only questions in these cases are,—was any promise of favour, or any menace or undue terror, made use of, to induce the prisoner to confess;—and if so, was the prisoner induced by such promise or menace, &c. to make the confession attempted to be given in evidence. If the judge be of opinion in the affirmative upon both these questions, he will reject the evidence. If, on the contrary, it appear to him, from circumstances, that, although such promises or

menaces were holden out, they did not operate upon the mind of the prisoner, but that his confession was *voluntary notwithstanding, and he was not biassed by such impressions in making it, the judge will admit the evidence. [75]

Although a confession, for the above or any other reasons, may not be receivable in evidence, yet any discovery that takes place in consequence of such confession, will be admitted: as, for instance, if a man by promise of favour, be induced to confess that he knowingly received certain stolen goods, and that they are in such a room in his house, and the goods be found there accordingly, although the confession itself cannot in that case be given in evidence, yet it may be proved, that in consequence of something the witness heard from the defendant, he found the goods in question in the defendant's house. R. *v.* Lockhart, 2 East, P. C. 658, 1 Leach, 430; and see 1 Leach, 300. 300 n. & 301 n.

How proved.] When a defendant pleads guilty, if he persist in his plea, it is immediately recorded by the proper officer; and the same, where a defendant yields himself to the King's mercy, and desires to submit to a small fine. In other cases, the admission or confession must be proved at the trial.

A confession before a magistrate, if taken down in writing at the time, should be produced, and proved by the magistrate or his clerk to have been duly taken; see 1 Hale, 585. 2 Hawk. c. 46. s. 3. 1 Leach, 240. 348; but if it be clearly shewn, that the examination of the defendant was not reduced to writing, or perhaps if the writing be lost or destroyed, then parol evidence of it may be admitted. See R. *v.* Lamb. 2 Leach, 629. Where the examination was taken in writing, but the prisoner refused to sign it, without saying whether it was correct or not, Mr. Baron Wood refused to admit it in evidence. R. *v.* Telicote, 2 Stark. 483. But in *Lamb's* case (2 Leach, 625,) where it appeared that the written examination, at the time it was taken, was read over to the prisoner, and that he admitted it to be true, but refused to sign it: the judges held that it was admissible in evidence, in the same manner as if he had signed it; that a prisoner's confession, if not reduced to writing, may be given in evidence against him; and *à fortiori* if in writing, although not signed by him; for its being reduced to writing, renders it less doubtful, and entitles it to greater credit. Perhaps the distinction between written examinations signed and unsigned, may be correctly stated thus: if written examinations be not signed by the defendant, it is not evidence of a confession *per se;* but the person who thus reduced the examination to writing, may give parol evidence of it, referring at the same time to the writing, for the purpose of refreshing his memory; but a written examination, signed by defendant, is evidence *per se*, and merely requires parol evidence of the magistrate *or his clerk, that it was correctly taken, and read over to the prisoner before he signed it. [76]

Admissions or confessions to other persons than magistrates, if in writing, are proved as any other written instrument; if by parol, are proved by parol evidence of some person who heard them. In all cases of high treason, a confession in open court, precludes the necessity of proving the treason by witnesses. 7 & 8 W. 3. c. 3. s. 2. 1 Ed. 6. c. 12. s. 22. 5 & 6 Ed. 6. c. 11. s. 12. Fost. 241. In treasons not relating to the coin or seals, confession of an overt act upon an examination before a magistrate, or other person having authority for that purpose, if proved at the trial by two witnesses, is sufficient to convict the defendant; R. *v.* Francia, 1 East, P. C. 133 n. Fost. 243; but evidence of a confession to a per-

son not having such authority, although proved by two or more witnesses, can only be received in corroboration of the other evidence in the case, and the treason must still be proved by two witnesses, notwithstanding. R. v. Willis, 8 St. Tr. 250, 255; and see Fost 243. This, however, must be considered as having reference only to confessions given in evidence as proof of the offence charged in the indictment: but a confession before a magistrate or other person, may be given in evidence to prove a collateral fact, as, for instance, that the defendant is a natural born subject, (R. v. Vaughan. 5 St. Tr. 25. R. v. Smith. Fost. 242) or the like, and may be proved by one witness, as in ordinary cases. In cases of high treason, relating to the coin or seals, confessions are proved as in ordinary cases, whether they be confessions of the principal treason, or of collateral facts merely. See 1 & 2 Ph. & M. c. 10. s. 12. and c. 11. s. 3.

And in all cases, the whole of the confession should be given in evidence: for it is a general rule, that the whole of the account which a party gives of a transaction, must be taken together; and his admision of a fact disadvantageous to himself shall not be received, without receiving at the same time, his contemporaneous assertion of a fact favourable to him, not merely as evidence that he made such assertion, but admissible evidence of the matter thus alleged by him in his discharge. 4 Taunt. 245; and see the Queen's case. 2 Brod. & Bing. 294.

Also, it may be necessary to observe, that a man's confession is only evidence against himself, and not against his accomplices. 1 Hale, 585. 2 Hawk. c. 46. s. 3. R. v. Tong. Kell. 17, 18. R. v. Boroski, 3 Str. Tr. 474. In *Tinkler's* case, however, the dying declarations of an accomplice, were holden by the judges to be good evidence against the principal; and the majority of the judges were of opinion, that this evidence would of itself be sufficient to convict, although the testimony of the accomplice, if living, would not, unless corroborated by other evidence. 1 [77] East, P. C. 354. Also, in *cases of conspiracy, and of high treason in compassing the King's death, &c., any thing said or written by one of the accomplices, not as a confession simply, but for the purpose of furthering the common design, is admissible evidence against the others. See R. v. Watson, 2 Stark. 140, 141; and see ante, p. 63.

Sect. 6.

Presumptions.

Presumptive, or (as it is usually termed) circumstantial, evidence, is receivable in criminal as well as in civil cases: and indeed the necessity of admitting such evidence, is more obvious in the former than in the latter; for in criminal cases, the possibility of proving the matter charged in the pleading by direct and positive testimony, is much more rare than in civil actions.

A presumption is, where some facts being proved, another follows as a natural or very probable conclusion from them, so as readily to gain assent from the mere probability of its having occurred, without further proof. The fact thus assented to, is said to be presumed; that is, taken for granted, until the contrary be proved by the opposite party: *stabitur præsumptioni, donec probetur in contrarium.* Co. Lit. 373. And it is adopted the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the obvious facility of disproving it, or of proving facts inconsistent with it, if it really never occurred.

These presumptions are of three kinds: *violent* presumptions, where the facts and circumstances proved, *necessarily* attend the fact presumed; Gilb. Ev. 157; *probable* presumptions, where the facts and circumstances proved, *usually* attend the fact presumed; 3 Bl. Com. 372; and *light* or *rash* presumptions, which however have no weight or validity at all. Id. Gilb. Ev. 157. Co. Lit. 6 b. If, upon an indictment for murder, it were proved that the deceased was murdered in a house, and that the defendant was immediately afterwards seen running out of it with a bloody sword in his hand: these facts raise a violent presumption that the defendant was the murderer; for the blood, the weapon, and the hasty flight, are all circumstances necessarily attending the fact presumed, namely, the murder. Co. Lit. 6 b. Standf. 179 a. Gilb. Ev. 157. So, upon an indictment for stealing in a dwelling house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it would be a violent *presumption of [78] his having stolen them; but if they were found at his lodgings, some time after the larceny, and he refuse to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely. So, upon an indictment for arson, proof that property, which was in the house at the time it was burnt, was afterwards found in the possession of the defendant, raises a probable presumption that the defendant was present and concerned in the arson. See R. *v.* Rickman, 2 East, 1035. Where, upon an indictment for perjury, in falsely taking the freeholder's oath in the name of J. W. at a parliamentary election, it was proved that the freeholder's oath was administered to a person who polled on the second day of the election by the name of J. W., that there was no such person in fact as J. W.; that the defendant voted on the second day, though he was not a freeholder; that he did not vote in his own name, or in any other than the name of J. W.; that there was but one false vote given on the second day's poll; and that the defendant some time afterwards boasted that he had *done the trick*, and was not paid enough for the *job*, and was afraid he should be *pulled for his bad vote*: the court held that this was sufficient evidence for the jury to presume that the defendant voted in the name of J W., and consequently to find him guilty of the charge in the indictment. R. *v.* Price, 6 East, 323. Upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, proof that the defendant has passed other forged notes, raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged; and if, in addition to this, it be proved that the defendant, when he passed these notes, gave a false name or address, it amounts to a violent presumption of his guilty knowledge. And the same, upon indictments for uttering counterfeit money. Intention, also, can be but matter of presumption, arising either from the facts stated in the indictment, or from extrinsic facts stated in evidence. See ante, p. 65; and see upon the subject of presumptions generally, Arch. Pl. & Ev. 348—353.

Although presumptive evidence must, from necessity, be admitted, yet in felony and treason it should be admitted cautiously. And Sir Matthew Hale, in particular lays down two rules, most prudent and necessary to be observed, in this respect: *first*, Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods; and *secondly*, Never to convict any person of murder or manslaughter, till at least the body be found,—on account of two instances he mentions,

where persons were executed for the murder of others who were then alive, although missing. 2 Hale, 290.

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[79] *SECT. 3.

Written Evidence.

1. *Records.*
2. *Matters* quasi *of record.*
3. *Written instruments of a private nature.*

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1. *Records.*

Public statutes.] Public statutes, the rules of the common law, and the general customs of the realm, are never required to be set forth in the pleadings, or proved at the trial; because the court are bound *ex officio* to take notice of them. And therefore, when the printed copy of a public statute is produced at a trial, as is frequently the case, it is not to be deemed to be produced as evidence, but rather in aid of the memory of the court and jury. Arch. Pl. & Ev. 358. and see Gilb. Ev. 10. By stat. 41 G. 3. c. 90. s. 9, the statutes of Ireland prior to the union, printed and published by the King's printer, shall be received as conclusive evidence in any court of Great Britain.

Where the printed copy of a public statute was produced in proof of certain facts recited in the preamble, the court held that it was admissible evidence for that purpose. 4 M. & S. 352.

Private statutes.] Private statutes and particular customs, must be set forth in pleading, and proved if put in issue. A private statute is proved by an examined copy, Gilb. Ev. 12. See 1 Arch. Pr. B. R. and see 12 East, 479, unless it be otherwise directed by the statute itself. As to the distinction between public and private statutes, see Arch. Pl. & Ev. 359, 360.

Record of the King's courts.] A record is proved, either by producing the record itself; or by an exemplification of it under the great seal, which is of itself a record, and needs no further proof; Gilb. Ev. 14. 10 Co. 93; or by an exemplification of it under the seal of the court (whether of a court at common law or of one created by act of
[80] Parliament, 2 Sid. 146. *Gilb. Ev. 19. 17. 10. Co. 93. and see Hardr. 120) and which also needs no further proof; Gilb. Ev. 19; or by an examined copy: 10 Co. 92 b. 2 Ro. Abr. 678. l. 45. Hardr. 119:—according to circumstances.

Where matter of record is but mere inducement, and not the gist of the pleadings, it may be proved by an examined copy. Gilb. Ev. 26. This copy may be had from the officer in whose custody the record is; and the person who is to prove it at the trial, must examine the copy, whilst the officer reads the record. It is not necessary that the officer should also read the copy, whilst the witness examines the record. 1 Camp. 469. 471 n. 2 Taunt. 52.

But where matter of record forms the gist of the pleading, it must be proved by the production of the record itself, or by an exemplification of it. If it be a record of the same court in which it is pleaded, the record itself must be produced; if it be a record of another court, an exemplification (that is, a copy under seal) of it, is sufficient.

Where the record of an inferior court forms the gist of a pleading in the court of King's Bench, and is to be proved accordingly by an exemplification, sue out a *certiorari*, either with the cursitor, or with the proper officer of the King's Bench, directed to the chief justice, judge, or officer of the inferior court in whose custody the record is supposed to be, requiring him to certify the record to the court of King's Bench; and thereupon an exemplification of the record, under the seal of the inferior court, will be transmitted to the court of King's Bench, to be there used as evidence. See 2 Arch. Pr. B. R. 41; and see the form, 6 Went. 24. But where a record of the court of King's Bench is to be proved in an inferior court, you must sue out a *certiorari* with the cursitor, directed to the Chief Justice of the King's Bench, requiring him to certify the record to the court of Chancery; and the record being thereupon accordingly certified, an exemplification of it under the great seal is thence sent by *mittimus*, to the inferior court, to be there used as evidence. See Gilb. Ev. 14, 15. 1 Arch. Pr. B. R. 139.

So, where the record of a court of quarter sessions is pleaded in a court of oyer and terminer, or the converse, or where the record of one court of oyer and terminer is pleaded in another, the exemplification, in strictness, should in like manner be obtained upon *certiorari;* but I believe the general practice is to apply simply to the clerk of the peace or clerk of assize, who will make it out for you accordingly, without writ, or will attend with the record itself at the trial.

A record is very seldom the gist of a pleading in criminal cases, excepting in a plea of *autrefois acquit, &c.* or counterplea of Clergy; and in the former, it is almost always a record of the same court that is pleaded. The record in a counterplea of clergy is proved by the production of the record itself, if it be *a record of the same court, or [81] by an exemplification, if it be the record of another court, as above mentioned. Or, if it be the record of another court, it may be proved in the manner provided by statute, thus: By stat. 34. and 35. H. 8. c. 14, the clerk of the crown, or of the peace, or of assize, shall certify a transcript briefly of the tenor of the indictment, outlawry, or conviction and attainder, into King's Bench, in forty days; and the clerk of the crown, when the judges of assize or justices of the peace write to him for the names of such persons, shall certify the same, with the causes of the conviction or attainder. Or, by stat. 3. W. and M. c. 9. s. 7, the clerk of the crown, clerk of the peace, or clerk of assize, where a person admitted to clergy shall be convicted, shall, at the request of the prosecutor or any other on the King's behalf, certify a transcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of his having the benefit of clergy, and the addition of the party, and the certainty of the felony and conviction, to the judges where such person shall be indicted for any subsequent offence.

In all other cases but those provided for by these statutes, where a copy of a record is given in evidence, it must be a copy of the whole record: because the omission of part might have the effect of altering the sense and import of the residue. Gilb. Ev. 23. 3 Inst. 173. Thus, to prove a verdict, you must give in evidence a copy of the whole record, including the judgment; Bul. N. P. 234. Gilb. Ev. 37; for otherwise it would not appear but that judgment had been arrested or a new trial granted. Bul. N. P. 234. 1 Str. 162. But if it be required to prove merely that a certain trial was had, the *nisi prius* record, with the *postea* indorsed upon it, and regularly stamped and marked, is sufficient evidence for that purpose. Barnes, 449. and see 2 Stark. 364.

if it be necessary to prove what a witness said upon a former trial, it may be read from the judge's notes, or proved upon oath from the notes or recollection of any person who was present at the time; 3 Taunt. 262. 12 Mod. 318. Gilb. Ev. 68, 69; but in order to let in such evidence, it must first be proved that the former trial took place; and this can be done only by giving in evidence an examined copy of the record, Gilb. Ev. 68, or the *nisi prius* record with the postea indorsed on it, as above mentioned. 1 Str. 162.

In order to prove a writ, if it be the gist of the pleading, you must get it returned, and then procure and give in evidence an examined copy of it. See 1 Arch. Pr. B. R. 140. But if it be matter of inducement merely, it is not necessary that it should be returned, or proved by an examined copy: Gilb. Ev. 39; but the writ itself, if in your possession, may be given in evidence; or if in the possession of the other party, then upon proving the service of a notice upon
[82] him to produce it, and *that it has not been returned and filed, but that it was in the other party's possession after the day on which it was returnable, you will be allowed to give a copy of it in evidence. 4 Esp. 160. See Hardr. 323. Alleyn. 18.

A judgment of the House of Lords, is proved by an examined copy of it from the minute book; Cowp. 17; which may be had, upon application at the office of the clerk in parliament.

Convictions before justices of peace are proved by examined copies, which the clerk of the peace of the proper county will make out for you upon an application for that purpose.

To prove the passing of a fine, the chirograph is conclusive evidence, without further proof; Plowd. 110 b. Gilb. Ev. 24. Bul. N. P. 229; but if it be necessary to prove the proclamations, that must be done by an examined copy. Gilb. Ev. 25. 6 Taunt. 485. A common recovery is proved in the same manner as an ordinary judgment. See Arch. Pl. & Ev. 364. 360. & see stat. 27 El. c. 9. 14 G. 2. c. 20. s. 4.

To prove a deed which has been enrolled, the indorsement of the enrolment is evidence sufficient, without further proof of the deed; Gilb. Ev. 24. 97. 1 Salk. 280. and see 1 Doug. 56; but if the deed be lost, it can be proved only by an examined copy of the enrolment. Gilb. Ev. 25. Arch. Pl. and Ev. 365. 134. All this however must be understood of deeds only which need enrolment; for if any other deed be enrolled (as for instance, a bargain and sale for years, or the like) and be afterwards offered in evidence, it must be proved in the ordinary way, by the subscribing witness. Gilb. Ev. 99. 5 Co. 54. Style, 445. 1 Salk. 280.

Letters Patent.] Letters Patent may be given in evidence, without further proof; or they may be proved by exemplifications under the great seal. See Arch. Pl. and Ev. 365. 134.

2. *Matters* quasi *of record.*

Proceedings in Parliament.] Entries in the journals of the House of Lords and House of Commons, may be proved by examined copies from their minute books. Cowp. 17. 2 Doug. 594. The journals of the House of Lords have been holden evidence to prove, not only the address of the Lords to the King, but the King's answer also. 5 T. R. 445. But the resolutions of either house, with a view to ulterior proceedings, are no evidence of the facts therein stated; as, for instance, where the House of Commons resolved that a plot against the government existed, the resolution was holden to be no evidence of the existence of such a plot. 4 Str. Tr. 39.

Proceedings in courts of Equity.] The bill and answer may be proved by examined copies, Gilb. Ev. 56. 1 Barn. & Ald. 182. 3 Camp. 401, which may you obtain from the six clerks' office, *upon [83] application for that purpose. In order to prove the answer, you are obliged to give in evidence an examined copy of the bill as well as of the answer; Gilb. Ev. 55; but where it was proved by the proper officer that he had searched diligently in the office for the bill, and could not find it, the court allowed the answer to be read without it, Id. There is one exception, however, to this, namely, that upon an indictment for perjury alleged to have been committed in an answer, the answer itself must be produced, and it must be proved either that the party was sworn to it, or that the name subscribed to it is his handwriting, and that the name subscribed to the jurat is the name and handwriting of a master or other person having authority for that purpose. 2 Bur. 1189. 2 Camp. 508. And the same as to the depositions in equity.

A decree in equity, if it remain in paper, may be proved by an examined copy, together with an examined copy of the bill and answer; but if it have been enrolled, it must be proved by an exemplification under the great seal, which requires only to be produced in evidence, without further proof. See 1 Arch. Pr. B. R. 142.

Proceedings in courts of law, not being records.] Rules of court are proved by office copies; 1 L. Raym. 745. 1 Camp. 102. 471 n. Arch. Pl. & Ev. 367. 361; it is not necessary to have them examined. A rule of court is evidence that the court have ordered, as is therein stated; but it is not evidence of any matters in it which are the mere suggestions of the party who obtained it. 6 Taunt. 19.

A judge's order may be proved by the production of the order itself; or by an office copy of the rule by which it had been made a rule of court. 4 Camp. 17.

Affidavits, being admissions upon oath, are evidence as such against the parties who made them. Gilb. Ev. 51. 56. 7 Taunt. 577. When filed with the clerk of the rules in the King's Bench, or with the secondaries in the Common Pleas, they may, it should seem, be proved by office copies; but if filed with any other officer, such as the filacer, the signer of the writs, &c., they must be proved by examined copies, or produced. All other affidavits not filed, can be proved only by production of the affidavits themselves, and by parol evidence of their having been sworn; Gilb Ev. 56; or if not proved to be sworn, yet perhaps they may be received as admissions of the deponents, upon proof of their handwriting. See Gilb. Ev. 56. 1 Arch. Pr. B. R. 142. Upon an indictment for perjury in an affidavit, however, the affidavit must in all cases be produced, whether filed or not, and it must be proved in the same manner as an answer to a bill in equity under the same circumstances. *Vide supra.*

**Proceedings in the ecclesiastical courts.*] The libel, answer, [84] depositions and sentence in the ecclesiastical courts, in matters within their jurisdiction, are proveable in the same manner as the bill, answer, depositions, and decree in equity. See ante, p. 82. Gilb. Ev. 66, 67. Com. Dig. Ev. C. 3. Arch. Pl. & Ev. 368. Their sentence in matrimonial causes, is in all cases evidence; and in all cases conclusive evidence of the facts they establish, except in suits of jactitation. Duchess of Kingston's case, 11 St. Tr. and see 2 Str. 960, 961. Hardw. 11. 18.

The practice of the ecclesiastical courts may, it seems, be proved in the courts of common law, by parol evidence. 3 Camp. 388.

A copy of the probate of a will, under the seal of the ecclesiastical

court, is sufficient evidence to prove a will of personal property, or that J. S. is executor, or the like; and the seal of the court sufficiently authenticates it, without further proof. Gilb. Ev. 71. 1 Ro. Abr. 678. 4 T. R. 258. 3 Salk. 154. Bul. N. P. 246. and see 1 Brod. & Bing. 219. The copy of the probate is conclusive evidence in the above cases; that is, the other party shall not be permitted to allege that the will proved is not the last will and testament of the deceased. Gilb. Ev. 73. T. Raym. 404—406. 2 Sid. 359. But he may give in evidence that the probate is forged, or that it was obtained by surprise. Gilb. Ev. 73, 74. T. Raym. & 2 Sid. *ubi supra.*

Administration is proved by a certificate from the ecclesiastical court, that administration was granted; Bul. N. P. 246; or you may get a clerk from the ecclesiastical court to attend at the trial with the book of acts, containing the direction for letters of administration to be granted, and the surrogate's *fiat* for the same. Id. 8 East, 187. and see 13 East, 232. Arch. Pl. & Ev. 369.

Proceedings in the court of admiralty.] The libel, answer, depositions, and sentence in the admiralty court, are proved in the same manner as the bill, answer, depositions, and decree of a court of equity. See Com. Dig. Evidence, C. 1. 1 Arch. Pr. B. R. 143. The sentence is conclusive evidence of the facts it establishes, not only against those concerned in interest and persons claiming under them, but also against strangers. Thus, a sentence condemning goods as captured from the enemy, is conclusive evidence that they were so captured. 2 Camp. 228.

Proceedings in inferior courts.] Judgments in a court baron, county court, or other inferior court, may be proved, by producing the books in which they are entered; or, it should seem, by examined copies. See Gilb. Ev. 74. 20. Com. Dig. Evidence, C. 1.

[85] *The court rolls of a manor, may be proved by examined copies, Gilb. Ev. 75. Comb. 337. 12 Mod. 24. or, it seems, by a copy under the steward's hand, Comb. 128. 1 Keb. 576. 720; or you may get the steward or his deputy to produce them at the trial. 1 Arch. Pr. B. R. 144. see Gilb. Ev. 75.

Proceedings on commissions of bankrupt, are proved either by producing the proceedings themselves, or (if entered of record, as directed by stat. 5 Geo. 2. c. 30. s. 41,) by copies duly signed and attested. And any person may procure the proceedings to be entered of record, upon petition to the Lord Chancellor. But depositions before the commissioners, may be given in evidence against the person who made them, by producing and proving them, as in the ordinary case of an affidavit, without having the proceedings recorded. Arch. Pl. & Ev. 370.

A judgment of the court for insolvent debtors, can be proved only by the production of the original entry of it. 2 Stark. 473.

The information and depositions of witnesses upon oath, before magistrates, in cases of manslaughter or other felony, (and which the magistrates are directed to put into writing before they bail or commit the prisoner, and then to certify the same to the next general jail delivery, 1 & 2 Ph. & M. c. 13. s. 4. 2 & 3 Ph. & M. c. 10.) upon being produced at the trial, and proved by the magistrate or his clerk to have been truly taken, may be given in evidence against the prisoner, if the person who made the depositions, &c. be dead, or unable to travel, 1 Hale, 586. Kel. 55, or it appear satisfactory to the court that he is kept away by the means or procurement of the prisoner. Kel. 55. But they cannot be thus read, if it merely appear that the witness is absent, and that the prosecutor has in vain used his endeavours to find him. Kel. 55. Nor can they be

read in the case of misdemeanors, at all ; the statute extending only to manslaughter and felony. 1 Salk. 281. Nor can they, it seems, be read in the case of petit treason, if the witness be living, even although he be unable to travel, or kept out of the way by the prisoner or by his procurement ; for the stat. 5 & 6 Ed. 6, which extends to all treasons, requires that the witnesses, if living, shall be examined in person upon the trial, in open court. Fost. 337. Depositions, to be thus given in evidence, must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness. 1 Salk. 281, 5 Mod. 183. 1 L. Raym. 730. 1 Str. 162. Bul. N. P. 243. 1 Leach, 512. 625. 1 Holt, 599. But where the depositions were not wholly taken in the presence of the prisoner, but the witness afterwards in his presence was resworn, and the depositions repeated and signed, the judges held that they were, under these circumstances, admissible evidence, for the prisoner had an opportunity of *cross examining the witness. [86] R. *v.* Smith, 2 Stark. 208, 1 Holt, 614. These depositions must appear to have been upon oath, also ; 1 Hale, 586. Bul. N. P. 242 ; but it is not necessary that they should be signed by the witness. R. *v.* Fleming & Windham, 2 Leach, 996. Besides being evidence in the cases now mentioned, these depositions may also be given in evidence by the defendant, in cases where the witnesses appear, in order to shew some material variance between their evidence at the trial, and before the magistrate.

Proceedings in foreign courts.] The judgments, &c. of foreign courts are proved by exemplifications under the seal of the court. And it must be proved that the seal affixed to the exemplification, is the seal of the court ; it is not sufficient to prove merely the judge's hand-writing subscribed to it. 3 East, 221. If indeed it be satisfactorily proved that the court has no seal, then an exemplification, signed by the chief judge of the court, would perhaps be received, upon proof of the judge's handwriting. 4 Camp. 28. But it is not sufficient, for the purpose of letting in such evidence, to prove that the seal of the court is so much worn as no longer to make any impression ; 1 Stark. 525 ; nor will a copy signed by the clerk of the court, be sufficient, even although it be proved that the court has no seal. 2 Stark. 6. See 3 Camp. 215 n. It may be necessary to state, that the rule here laid down for the proof of foreign judgments, &c., relates equally to the judgments of courts in the British colonies, as to those of courts in countries unconnected with this kingdom. But records of the courts in Ireland may be proved by examined copies, &c., in the same manner as the records in this country. It is necessary however that the court should be satisfied that it was with a *record* the copy was examined ; and therefore, where the witness produced to prove the copy, stated that he examined it with a parchment roll shewn to him in a room over the four courts at Dublin, without seeing from whence it was taken, or knowing the person who produced it to be an officer of the court, Lord Ellenborough refused to receive it in evidence. 4 Camp. 372, 1 Stark. 183.

As to the proof of the laws of a foreign country : if not written, they may be proved by the parol evidence of witnesses of competent skill ; if written, a copy properly authenticated must be produced. 3 Camp. 166. 4 Camp. 155, per Gibbs, C. J.

The acts of state of a foreign government, must be proved by copies examined with the public archives abroad ; a copy printed and published abroad by the authorized printer of the foreign government, will not, it seems, be sufficient. 1 Camp. 65 n.

**Surveys, Inquisitions, &c.*] Inquisitions taken by virtue of the King's writ, or of a commission under the seal of the Exchequer, &c., are proved by the production of the writ or commission and inquisition, or by an examined copy thereof if they have been returned and filed; and indeed it may be questionable whether they can be evidence at all, until returned and filed.

Public surveys, many of which are to be found in the Exchequer, are proved by the production of them by the proper officer, without further proof.

Domesday book, when evidence, (see Arch. Pl. & Ev. 373. 265,) must be produced at the trial, if intended to prove the gist of the pleading; but if intended to prove some collateral matter merely, an examined copy of that part of the book relating to it, will be sufficient. Arch. Pl. & Ev. 373.

Registers, &c.] Christenings, marriages, and burials, may be proved by the parish register in which they are entered, by giving in evidence either the register itself, or an examined copy of it. Gilb. Ev. 72. 2 Bac. Abr. Ev. F. Besides the register, some proof must be given of identity of the parties married, &c. 1 Doug. 170.

The Fleet books are not evidence of a marriage. Peake, 231. The marriage of Jews, is by a written contract, which is afterwards solemnly ratified in the synagogue. In order to prove such a marriage, it is not sufficient, it seems, to prove the religious ceremony, by the parol testimony of some person who was present, but the contract must also be proved. 1 Camp. 61.

The register of the navy, with the letters *Dd* opposite to a name therein registered, (it being proved to be the practice of the navy office to write these letters opposite to the names of such persons as died,) was holden admissible evidence of the death of a man, opposite to whose name these letters were written. Bul. N. P. 249.

The prison books of the Fleet and King's Bench prisons, are admissible evidence to prove the time at which a prisoner was committed or discharged; but they are not admissible to prove the cause of commitment. 3 B. & P. 188.

The poll books of an election are also admissible evidence, and may be proved by an examined copy. Willes. 424. 1 Str. 307. So, an entry in a family Bible, an examined copy of an inscription on a tomb stone, a pedigree hung up in a family mansion, and the like, are admissible evidence in questions of pedigree. Cowp. 594, and see 4 Camp. 401. T. Raym. 84.

Certificates, &c.] The certificates of bishops with respect to
[88] marriage, general bastardy, excommunication, orders, and *other the like matters, are received in evidence; Co. Lit. 74. 6 T. R. 637; so are the certificates of the judges in Wales, respecting the practice of their courts, 6 T. R. 638, and the certificate of justices of peace, as to a highway being in repair. 6 T. R. 619.

But the certificate of a British consul abroad, is not admissible as evidence in the courts in this country. 3 Taunt. 162. Yet instruments of this description are daily sent here from abroad, under the mistaken idea that our courts receive them in evidence.

The mere production of a *diploma* of doctor of physic, under the seal of one of the universities, is not of itself evidence to shew that the party therein named is entitled to that degree. 8 T. R. 303.

Ancient terriers, &c.] Ancient terriers, surveys, and maps of manors, &c., when evidence, must be produced at the trial, and such circumstan-

ces connected with them stated in evidence, as may induce the court and jury to give credit to them. See Arch. Pl. & Ev. 375, 376.

Corporation books, &c.] Entries in corporation books, and in the books of public companies, relating to things public and general, and entries in other public books, may be proved by examined copies. 1 Str. 93. 307. Entries in the books of the custom house, of the bank, and of the East India Company, or the South Sea Company, and the like, may be proved in this manner. See 2 L. Raym. 851. 2 Str. 954. 1005. Hardw. 128. 2 Doug. 593 n. 8. Peake, 30. 4 Taunt. 787. But instruments of a private nature, such as a letter found in the corporation chest, 1 Str. 401, or the like, must be proved in the ordinary way, as any other instrument.

Inspection of corporation books and other public writings, is granted in civil actions, see 1 Arch. Pr. B. R. 145, but not in criminal cases, where it would have the effect of making a defendant furnish evidence to criminate himself. 1 W. Bl. 351. 37. 1 Wills. 239. 1 L. Raym. 705. 2 Id. 927. 2 Str. 1210.

Public acts of state.] The gazette, printed and published by the King's printer, is evidence of all acts of state. 5 T. R. 436. Therefore a gazette, which stated that addresses had been presented to His Majesty from several bodies of his subjects, expressive of their loyalty, was holden to be evidence of that fact. Id. See 2 Camp. 513.

So, the King's proclamations in the gazette, are evidence. See 2 Camp. 44. Where a proclamation recited that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for *the discovery and apprehen- [89] sion of the offenders, it was holden to be admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those places. 4 M. & S 532.

So, the articles of war, printed by the King's printer, are evidence. 5 T. R. 442, 446. So, the almanac annexed to the common prayer book, (6 Mod. 81,) is evidence that such a day of the year was Sunday, or the like. Cro. El. 227. 1 Leon. 242. 1 Sid. 300. 6 Mod. 41.

As to the acts of state of a foreign government, see ante, p. 86.

3. *Written Instruments of a Private Nature.*

When a deed is to be given in evidence, the general rule is, that the deed itself must be produced at the trial. 10 Co. 92 b. 93. To this, however, there are some exceptions arising from necessity; as, where the deed is in the hands of the opposite party, 3 T. R. 153. 5 Co. 75 a. or has been lost by time or accident, or by any other casualty, as by fire, &c., 3 T. R. 151. 153 n, the contents of it may be proved by a copy, or other secondary evidence. 10 Co. 92 b. 1 Mod. 4. Upon indictments for forgery, however, it is the generally understood rule, that the prisoner cannot be convicted unless the forged instrument be produced.

Secondly, as to the proof of the execution of the deed: if there have been no subscribing witnesses to it, then proof of the handwriting of the parties will be sufficient, the law in such a case presuming a delivery. But if the deed were attested, the execution must be proved by at least one of the subscribing witnesses, Gilb. Ev. 99. 7 T. R. 266. Peake, 31. 4 Esp. 240, and see 1 Stark, 304, unless perhaps where the fact of execution is one of the admissions in the cause; 1 Camp. 375; for even the acknowledgment of the party, or his admission in an answer to a bill of discovery, are in this case deemed merely secondary evidence. 4 East, 53. 1 Esp. 89. 5 Esp. 16. and see 5 T. R. 366. It does not appear ne-

cessary that the subscribing witness should swear that the deed was actually executed in his presence; if he were afterwards desired to attest it by the party who executed it, Peake, N. P. C. 146. 1 Esp. 97, or in the presence of the party, 3 Esp. 171, 2 B. & P. 217, and he attest it accordingly, this will be sufficient, provided the attestation and execution to be done so nearly at the same time as fairly to be deemed parts of the same transaction. MS. E. 1814. On the other hand, a person who even sees an instrument executed, but who is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness. 3 Camp. 232. To this rule of proving the execution by the evidence of an attesting witness, however, there are many exceptions. *First*, *where the execution forms one of the admissions in the cause. *Vide supra*. *Secondly*, where the deed is thirty years old or upwards, the court will presume that it has been duly executed, and will not require it to be proved, Bul. N. P. 255. 1 Esp. 275. 278, provided possession have followed the deed, or that some satisfactory account be given of it, and provided there be no rasure or interlineation in it, and that it do not import fraud; otherwise it must be proved as in ordinary cases, either by the attesting witness, or by evidence of his and the party's handwriting. 2 Bac. Abr. Ev. F. Bul. N. P. 255. Arch. Pl. & Ev. 379. And see 3 Taunt. 91. It may be necessary here to remark, that when you give an ancient obligation for the payment of money in evidence, you should be prepared to prove the payment of interest within the last twenty years, or other circumstances sufficient to rebut the presumption the law will otherwise raise of such obligation's having been satisfied. See 1 Bur. 444. 2 Str. 826. 1 W. Bl. 532. 1 T. R. 272. *Thirdly*, where a deed enrolled (and to which enrolment was necessary) is given in evidence, it is not necessary to prove the execution of it by the subscribing witness; but it may be proved by the enrolment indorsed on it, or, if the deed be lost, by an examined copy of the enrolment, as already mentioned, ante, p. 82. *Fourthly*, where one deed is recited in another, proof of the second deed is deemed proof of the one recited, as against the parties to the second deed, and those claiming under them. 2 Bac. Abr. Ev. F. Arch. Pl. & Ev. 379. *Fifthly*, if the name of a fictitious person be put as the only subscribing witness, evidence of the handwriting of the party alone will be sufficient. Peake, N. P. C. 23. So, if the subscribing witnesses be since dead: 1 Barn. & Ald. 19. and see 6 East, 85: or have become insane, 12 Viner Abr. 224. 3 Camp. 283, or blind, see 1 L. Raym. 734, or be abroad, out of reach of the process of the court, Peake, N. P. C. 99. 1 Esp. 2. 7 T. R. 265. 12 Vin. Abr. 224. and see 1 Stark. 90, whether domiciled there or not; 2 East, 250; or if he have set out for the purpose of leaving the kingdom; 1 Taunt. 461; or if from circumstances it may fairly be presumed that he has left the kingdom; 2 Camp. 282; or if it appear that he is serving in the navy, 2 Taunt. 223, or the like; or if after a *bonâ fide* serious and diligent enquiry, he cannot be found; 1 Doug. 93. 2 East, 183. 7 T. R. 266. 1 Camp. 303. 1 Taunt. 364. 2 Camp. 282; or if he be interested in the event of the suit, 2 Esp. 697. 5 T. R. 371. 1 Str. 34, or become subsequently incompetent as a witness; 2 Str. 833. Peake, Ev. 102; then, upon proof of any one of these circumstances, you will be permitted to give secondary evidence of the execution of the deed; that is, you may prove the deed, by proving the handwriting of the witness and party. See 1 Barn. & Ald. 19. But if there be two witnesses to the deed, *and any of the circumstances just now mentioned apply only to one of them, the deed must of

[90]

[91]

course be proved by the other. Also, by stat. 26 G. 3. c. 56. § 38, deeds executed in the East Indies, when the subscribing witnesses are resident there, may be given in evidence in Great Britain, upon proof of the handwriting of the parties and of the witnesses. *Sixthly*, if the deed appear to be attested by one or more persons, but in point of fact these persons never saw the deed executed or dlievered, the attestation may be deemed a nullity, and the deed be proved by proving the handwriting of the party. 2 Camp. 635, 636. 3 Esp. 173 n. Peake, N. P. C. 146; but see 1 Camp. 412. 4 Bur. 2224.

Upon an indictment for forging a deed or other written instrument, all that it is incumbent upon the prosecutor to prove is, that the name subscribed to the deed is not the handwriting of the party whose signature it purports to be.

To prove a will of lands, it is only necessary to call one of the witnesses who attested it; Peake, Ev. 103. 1 Esp. 391. Skin. 413. 2 Str. 1253. 1 W. Bl. 8; if the opposite party wish, he may call the other two. Bul. N. P. 264. The witness called, however, should be prepared to give parol evidence of every circumstance attending the attestation, necessary to shew that the will was duly executed and attested, according to the directions of the statute.

All other writings, not under seal, are proved in the same manner as deeds: that is, by the subscribing witness, if there be one; 2 Camp. 94, 1 Stark. 53. 2 Stark. 180; or if not, then by proof of the party's handwriting. It is said also, that a writing of this kind, if ancient, shall be received in evidence without proof, in the same manner as an ancient deed. Tr. *per pais*, 370. But see Fortesc. 43. If lost or destroyed, copies, or other secondary evidence of their contents will (excepting in the case of forgery, see ante, p. 89,) be received; but evidence must be given, at the same time, of the genuineness of the original instrument. See Bunb. 389. 1 Atk. 446.

The handwriting of a witness or party, may be proved either by some person who has a knowledge of it from having seen him write, Arch. Pl. & Ev. 380, and see 4 Esp. 37. 1 Esp. 14. 2 Stark. 164. 1 Holt, 420, or from having been in the habit of corresponding with him; 1 W. Bl. 384; or the handwriting of a party may be proved by his own acknowledgment or admission. 1 Esp. 143. But it cannot be proved by comparing it with other writings, although confessedly of his handwriting, 4 Esp. 37. 117. Peake, N. P. C. 20. 1 Esp. 14, unless perhaps where there is already contradictory evidence of the fact, 1 Esp. 351. 4 T. R. 497, or perhaps where the writing is so ancient that no witness can be found who can prove it. Gilb. Ev. 25, 26. see Peake, N. P. C. 20 n. A person, however, *who is skilled in the detection of forgeries, may [92] prove that the writing is in a feigned hand, though he never saw the party write. 4 Esp. 117. 1 Esp. 14. 4 T. R. 497. See 2 Esp. 714.

Where a genuine instrument is to be given in evidence, care must be taken that it be duly stamped, if a stamp be necessary to its validity. But upon an indictment for forging a bill of exchange, the judges held that it was not necessary that it should be stamped, in order to its being received in evidence; although in stat. 23 G. 3. c. 49, imposing a stamp duty upon bills of exchange, it is said that no such instrument shall be received as evidence, unless it be first duly stamped. R. *v.* Hawkswood, 2 T. R. 606.

Sect. 4.

Parol Evidence.

1. *In what cases receivable.*
2. *Incompetency of Witnesses.*
3. *Credit of Witnesses.*
4. *How many Witnesses Requisite.*
5. *Process against Witnesses.*
6. *Witnesses' Expenses.*
7. *Examination of Witnesses.*

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1. *In what cases receivable.*

Parol evidence is inferior to written evidence; and as the general rule is that the best possible evidence shall be given, it follows of course that parol evidence can never be received, where there is written evidence of the same fact. And so strict is the rule in this respect, that where an agreement in writing on unstamped paper, was designedly destroyed by one of the parties to it, it was holden that it was not open to the other party to give any evidence whatever of the matter of agreement: parol evidence could not be received of it, because it had been reduced to writing; nor could parol evidence be received of the contents of the written instrument, as secondary evidence, because if the instrument itself were produced, it could not be received in evidence for want of a
[93] stamp. 2 Barn. & Ald. 478. 3 Barn. & Ald. 588. and see Id. *326. and 2 Brod. & Bing. 99. But where a parol contract is made subsequently to a written contract, the latter being substituted for the former, parol evidence may of course be given of the latter contract. 12 East, 578. As to the cases in which parol evidence may be received as secondary evidence of a written instrument, where the written instrument is proved to have been burnt, destroyed, or lost, or in possession of the opposite party, see ante, p. 89. 91.

Secondly, It is a general rule that parol evidence shall not be received of any thing which is not immediately within the knowledge of the witness; he must speak of facts which happened in his presence or within his hearing. To this, however, there is one exception, namely, that in a matter of science, a person intimately acquainted with it, may be called upon to give his opinion as to the probable result or consequence from certain facts already proved. As, for instance, if it were required to determine whether a man died of any particular disease, symptoms being proved, a physician may be called upon to give in evidence his opinion as to the disease of which the party died, as founded upon the symptoms so proved, although he have never seen the deceased. So, upon an indictment for murder, the deceased's wounds, &c. being described, a surgeon may be called upon to give in evidence his opinion, whether the deceased died in consequence of his wounds, or from natural causes.

Thirdly, We have seen (ante, p. 72,) that hearsay is no evidence, excepting in certain excepted cases before mentioned.

But in other cases, all facts which cannot be proved by records or other written evidence, may be proved by parol evidence.

2. *Incompetency of Witnesses.*

Persons deemed incompetent as witnesses, and who therefore shall not be allowed to give evidence upon a criminal prosecution, may be classed as follows: those who do not appear to have sufficient discretion; those who do not appear to have a right sense of the sanctity and moral obligation of an oath; those whose crimes have rendered them infamous; those who are interested in the event of the suit; those who stand in the relation of husband or wife to the defendant; and lastly, the counsel and soliciters of the defendant and prosecutor, in some instances.

From want of discretion.] An ideot shall not be allowed to give evidence; Co. Lit. 6 b. Gilb. Ev. 144; nor a lunatic, Co. Lit. 6 b. Gilb. Ev. 144, unless during a lucid interval; Com. Dig. Testm. A. 1; nor a person, who is deaf, dumb, and blind. *But a person who [94] is deaf and dumb, merely, is not incompetent; and he may be examined through the medium of a sworn interpreter, who understands his signs. R. *v* Pollock, MS. 1814. So, an infant of any age, may be a witness, provided such infant appear sufficiently to understand the nature and moral obligation of an oath. 1 Leach, 180. 104. See 2 Hale, 278. 284. Com. Dig. Testm. A. 1. 2 Str. 700. Gilb. Ev. 144.

From want of religion.] It is not necessary that a witness should be a christian, or even believe in the old testament, (as laid down in some of the older authorities, see Co. Lit. 6 b. Gilb. Ev. 142, 143,) in order to render him competent; it is sufficient if he believe in a God, in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take. Willes. 538. 1 Atk. 19, 21. 1 Wils. 84. Bul. N. P. 292. Peake, 11. Thus, christians of all sects and denominations, see Leach, 319. Peake, 11. 23. 155, Jews, Gilb. Ev. 143. 2 Str. 821, Turks, Moors, and other Musliminn, see 2 Str. 1104, Gentoos, Willes. 538, 1 Atk. 19, 21, 1 Wils. 84, and the like, may be witnesses. But a man wholly without religion, and having no belief in the moral obligation of an oath, shall not be received to give evidence in any case whatever. 1 Atk. 44.

From infamy.] Persons convicted of treason, felony, piracy, *premunire*, perjury, forgery on stat. 5 El. c. 14. 2 Hawk. c. 46. s. 19. Gilb. Ev. 139. 2 Ro. Abr. 686. Co. Lit. 6, or any other species of the *crimen falsi*, such as conspiracy, barretry, and the like, 1 Leach, 349. 2 Salk. 690, shall not be allowed to give evidence. Formerly it was the general opinion that standing in the pillory for any offence, or undergoing any other species of infamous corporal punishment, incapacitated a man from being a witness; 2 Hawk. c. 46. s. 19. Co. Lit. 6 b. 5 Mod. 74. 2 Salk. 461. 689; but it is now settled that it is the infamy of the crime, and not the nature or mode of the punishment, that destroys the competency; 2 Wils. 18. Gilb. Ev 140; and therefore if a man have stood in the pillory for a libel, or for seditious words, or the like, he is not thereby disabled from being a witness. Gilb. Ev. 140, 141. 3 Lev. 426. So, outlawry in a civil suit, does not render a man incompetent as a witness; Co. Lit. 6 b. 2 Hawk. c. 46. s. 21; nor does a conviction of petit larceny; 31 G. 3. c. 35; nor has the mere commission of any offence that effect, unless the party have been actually convicted of it. Kel. 17, 18. 1 Sid. 51. Cowp. 3. See 11 East, 309.

But a pardon of any of these offences has the effect of restoring
[95] competency, in as full a manner as if the witness had *never been convicted; 2 Hawk. c. 46. s. 22. Gilb. Ev. 141, 142; and this even in the case of perjury at common law. 5 Esp. 94. There are two exceptions, however, to this: namely, perjury on stat. 5 El. c. 9, and conspiracy at the suit of the King; in which cases the incompetency forms a part of the judgment, and is not merely a consequence of it. 2 Hawk. c. 46. s. 22.

Also, burning in the hand for felony, (being *quasi* a statute pardon,) T. Raym. 369. 380. Kel. 37. Styl. 338, and the punishment now substituted for it by stat. 19 G. 3. c. 74. s. 3, have the same effect in restoring competency as an actual pardon. And proof of the record, wherein it appears that clergy was granted to the party, is sufficient, without proving that he was burnt in the hand. Per Trevor, 7 Ann. see Com. Dig. Testm. A. 4. but see 5 St. Tr. 166. Kel. 93.

The only mode of objecting to the competency of a person convicted, is by proving the record of his conviction; Bul. N. P. 292. 8 East, 77: And see 1 Arch. Pr. B. R. 171; even the admission of the witness that he has been convicted, is not sufficient. 8 East, 77. And it must appear that he received judgment; for merely being found guilty of the offence, is not sufficient. T. Raym. 32. 2 Sid. 51. Gilb. Ev. 142. 142. And see Cowp. 3. 2 Stark. 183.

From Interest.] It is a general rule of evidence, not to admit the testimony of a witness who is to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only. Co. Lit. 6. Gilb. Ev. 119. See 1 Sid. 237. 2 Atk. 615. Hardw. 358. 4 Bur. 2251. 3 T. R. 27. 7 T. R. 62. and see Arch. Pl. & Ev. 389—396.

There are several exceptions however to this rule, in criminal cases. *First*, a person entitled to a reward upon the conviction of the defendant, is not thereby rendered incompetent to give evidence against him, R. *v.* Muscot, 10 Mod. 193, whether the reward be given by statute, by proclamation, or by a private person. 1 Ph. Ev. 119. 127.

Secondly, Where the penalty for an offence is given by statute to the poor of a parish or place, an inhabitant of that parish or place is a competent witness to prove the offence, if the penalty do not exceed 20*l.*, notwithstanding that the parish or place may be benefited by the conviction. 27 G. 3. c. 29. So, upon an indictment for not repairing a bridge or highway, an inhabitant of the county or parish respectively may be a witness, although the county or parish may be benefited by his testimony. 1 Ann. st. 1. c. 18. s. 13.

Thirdly, the prosecutor is in all cases (with the exception of forgery) a competent witness to prove the offence, Peake, Ev. 153—155.
[96] See Gilb. Ev. 123, even although he entitle himself *to the restoration of his stolen goods by the conviction, R. *v.* Muscot, 10 Mod. 193, or entitle himself to costs by the conviction, where the indictment has been removed by *certiorari*. Id. Upon an indictment for perjury, the party injured by the perjury is a competent witness to prove it; for he cannot afterwards avail himself of the conviction, in any civil suit either in law or in equity. 4 East, 572. and see Id. 572 n. 1 Taunt. 520. Forgery, indeed, is the only criminal case in which the party injured is not a competent witness to prove the offence; the person whose name is forged, is deemed incompetent as a witness to prove the forgery. Gilb. Ev. 124. R. *v.* Rhodes, 2 Str. 728. R. *v.* Caffy, 2 East, P. C. 995. R. *v.* Taylor, 1 Leach, 225. R. *v.* Boston, 4 East, 582. per Ellenborough, C. J. This rule as to forgery, seems to have been originally adopted, upon

the erroneous supposition that the witness would be discharging himself of his liability by the conviction, and that the record of conviction might be given in evidence for him in an action upon the forged instrument; and we accordingly find that in cases where this reason does not apply, the person whose name was forged has been admitted as a competent witness. Thus, upon an indictment for forging a bank note, the cashier, whose name was forged, was holden to be a competent witness to prove the forgery. R. *v.* Newland, 1 Leach, 350. Upon an indictment for forging the indorsement of the payee of a bill of exchange, the payee, who was to have paid the produce in discharge of a debt due from the drawer, but who in fact never received the bill, was holden to be a competent witness to prove the forgery. R. *v.* Sponsonby, 1 Leach, 374. and see Id. 57. Upon an indictment for forging a receipt, the person whose name was forged, having first recovered the money from the defendant, was holden to be a competent witness to prove the forgery. R. *v.* Wells, Bul. N. P. 289.

Fourthly, an accomplice is a competent witness, although his expectation of pardon depend upon the defendant's conviction. Gilb. Ev. 136. 1 Hale, 303. 2 Hawk. c. 46. s. 94. See Say. 289. Willes. 423. So, an accessary is a competent witness against his principal; and the principal against the accessary, in all cases where the latter may be indicted before the attainder of the former: as, for instance, upon an indictment for receiving stolen goods, the person who stole the goods is a competent witness. R. *v.* Patram, 2 East, 782. R. *v.* Haslam, 1 Leach, 467. But the fact of the witness's being an accomplice, accessary, or principal, detracts very materially from his credit; Gilb. Ev. 136; and it is always considered necessary, in order to induce the jury to credit his testimony, to give other evidence confirmatory of, at least, some of the leading circumstances of his story, from which the jury may be able to presume that he has told the truth as to the rest. See Cowp. 336.

**From being parties to the suit.*] In civil actions, neither party [97] shall be allowed to give evidence for, nor obliged to give evidence against, himself. In criminal cases, the rule is the same; but it is not applicable to the prosecutor, for the indictment, &c. is at the suit, not of the prosecutor, but of the King; and the prosecutor is accordingly deemed a competent witness, in all cases excepting forgery. See ante, p. 95, 96. The defendant, so far from being obliged to give evidence against himself, is not bound even to answer the questions put to him upon his examination before a magistrate. And the defendant's wife cannot be compelled, nor indeed will she be permitted, to give evidence against her husband, excepting in some instances, where she is also the prosecutrix. Vide post. It sometimes happens, however, that the prosecutor, in order to exclude the evidence of a material witness for the defendant, prefers his indictment against both jointly; if, therefore, in such a case, no evidence whatever be given to affect the person thus unjustly made a defendant, the judge (in his discretion, 1 Holt, 275,) may direct the jury to acquit him in the first instance, so as to give an opportunity to the other defendant to avail himself of his testimony. Gilb. Ev. 131, 132. Bul. N. P. 285. 1 East, 313 n.

From relation to the parties.] It is a general rule of evidence that husband and wife cannot be witnesses either for or against each other; Co. Lit. 6 b. Gilb. Ev. 133, 134. 4 T. R. 678. 2 T. R. 263. Hardw. 264. Bac. Abr. Evidence, A. 1. See 1 Str. 504; and it is doubtful if this rule do not extend to the case of a woman cohabiting with a man, and passing as his wife. See Campbell, *v.* Twemlow, 1 Price, 81. Where several

were indicted for a conspiracy, Lord Ellenborough refused to allow the wife of one of them to give evidence in favour of some of the others; for if all the others were acquitted, the husband must consequently have been acquitted also. R. *v.* Locker et al. 5 Esp. 107. and see 2 Str. 1094. So, in conspiracy, the wife of one of the defendants should not be allowed to give evidence against any of the others, as to any act done by him in furtherance of the common design; particularly after evidence given, connecting the husband with that defendant in the general conspiracy.

To the rule above laid down, however, there are two exceptions: namely, *First*, in cases of high treason, husband and wife may be witnesses against each other. R. *v.* Griggs, T. Raym. 1. but see 1 Br. & Gold. 47, Co. Lit. 66. 1 Hale, 301. cont. and see 1 Hale, 48. dub. Secondly, when a husband is indicted for a personal injury to the wife, the latter is a competent witness to support the prosecution; Bul. N. P. 286. 1 Hale, 301; and the same, when the wife is indicted for a personal injury to the
[98] husband. Where a husband was indicted for being present *aiding and assisting another in committing a rape upon his own wife, the wife was holden to be a competent witness to prove the offence; R. *v.* Lord Audley, 1 St. Tr. 393; and the same, where a husband was indicted for the battery of his wife. R. *v.* Azyre, 1 Str. 635. So, upon an indictment against a man for the murder of his wife, the dying declarations of the wife were allowed to be given in evidence against him. R. *v.* Woodcock, 2 Leach, 563. R. *v.* John. 1 East, P. C. 357. *Thirdly*, upon an indictment for bigamy, the second wife is a competent witness against the defendant, the first marriage being previously proved; for the second marriage is void. 1 Hale, 393. So, upon an indictment for forcible abduction and marriage, the woman is a competent witness against the defendant; for a contract obtained by force, has no obligation in law. Bul. N. P. 286. 1 Hale, 302. These, however, are not exceptions to the rule above mentioned; for here the woman is not, in law, the wife of the defendant.

A father or mother may be a witness for or against the child; 1 Wils. 333. 2 T. R. 263. 6 T. R. 330. Hardw. 277. 1 Salk. 289. 2 Str. 925. 940. Cowp. 591; a child, for or against the father or mother; Gilb. Ev. 135; a servant, for or against the master or mistress; Id.; a master or mistress, for or against the servant.

Counsel, solicitors, and attornies, are privileged from giving (indeed they will not be permitted to give) evidence of any matters confided to them by their client, in their professional capacity, Gilb. Ev. 136. 4 T. R. 753. and see 2 Camp. 9. 2 Stark. 274. 2 Brod. & Bing. 4, either in the cause respecting which the communication was made, or in any other, 4 T. R. 753, and whether the client be a party to the cause or not. 2 Camp. 578. So, an attorney is not bound, on a *subpœna duces tecum*, to produce any deeds or papers belonging to his client in his custody, if it appear that the production will operate to the prejudice of his client. 1 Stark. 95. And what is here said as to attornies, is equally applicable to their agents, 2 Stark. 239, and to persons employed by them, as interpreters between them and their clients. Peake, 78. This privilege, however, is to be considered as excluding the disclosure merely of such facts as have been communicated confidentially by the client to the attorney, &c. in his professional capacity; and therefore does not extend to facts known to the attorney previously to his retainer; Gilb. Ev. 136. 1 Vent. 197. Skin. 404; nor to the contents of a notice served upon him by the attorney on the other side, requiring him to produce at the trial

a certain paper belonging to his client in his hands, 7 East, 357, or the like; and where an attorney was present at the time his client swore to an answer in chancery, it was holden that he could be compelled to give evidence of that fact, on an indictment against his client for perjury. Bul. N. P. 284. but see 2 Str. *1122, cont. This privi- [99] lege also is strictly confined to counsel, solicitors, attornies and their agents, &c.; it does not extend to the steward or other agent of the party, 2 Atk. 524. 4 T. R. 753, or to a conveyancer, 2 Atk. 525, or to a physician or other medical person, 11 St. Tr. 243. 4 T. R. 753, however confidential the communications to such persons may be.

Where also the disclosure of a particular fact, not bearing directly upon the matter in question, may be of detriment to the public service, the court will not compel a witness to disclose it. As, for instance, in *Hardy's* case, (24 How. St. Tr. 753.) a witness who was employed to obtain information of the proceedings at a meeting of one of the corresponding societies, was not allowed to disclose the name of his employer.

Sect. 3.

Credit of Witnesses.

The credibility of a witness is compounded of—his knowledge of the facts he testifies,—his disinterestedness,—his integrity,—his veracity,—and his being bound to speak the truth, by such an oath as he deems obligatory. Proportioned to these, is the degree of credit his testimony deserves from the court and jury.

From their knowledge.] Although a witness be perfectly disinterested, although he be a man of integrity and veracity, and have a just sense of the moral obligation of the oath he has taken, still the degree of credit to be given to his testimony depends upon his real knowledge of the facts he testifies. A man may be deceived in a fact, from deriving his knowledge of it through a false medium; from his attention being occupied more by the circumstances accompanying it, than by the fact itself, at the time of its occurrence: or from a thousand other circumstances, which, if candidly stated, might be satisfactorily answered and accounted for by the other party, so as to convince the witness himself that he laboured under a mistake. Where there is a doubt, therefore, whether the evidence given by a witness be not founded in some misconception, it is the duty of the counsel who cross-examines him, to question him as to the sources of his knowledge; his reasons for believing the fact to be as he has stated; his reasons for recollecting it; the circumstances attending its occurrence; whether it was light or dark, and whether he was near or distant, at the time it occurred; and the like: so that the jury *may be [100] able to judge of the degree of confidence they should place in the witness's testimony. If a witness refuse to answer such questions, or do not answer them satisfactorily, it should have the effect of detracting considerably from his credit in the estimation of the jury.

From their disinterestedness.] A witness, to be perfectly credible, must not be, in the slightest degree, biassed or partial to one party or the other. Therefore, if it appear that the witness is prejudiced against the party against whom he appears, or has before expressed sentiments indicative of such prejudice, or if it appear that a prosecution is pending against him for the same or a similar offence, and he come to disprove some of the

facts charged in the indictment against the defendant,—all these are circumstances which detract proportionably from his credit. In cases where the defendant is not obliged to appear personally at the trial, as in the case of informations and of indictments in the court of King's Bench,—the witness being liable as one of the defendant's bail, not merely goes to his credit, but seems to be an objection even to his competency; at least such is the case in civil actions. See Arch. Pl. & Ev. 391. Where the prosecutor is to derive an advantage from a conviction of the defendant, this we have seen (ante, p. 95, 96.) is no objection in general to his competency; it goes to his credit merely. A father is a competent witness for his son, and a son for his father; but the interest arising from the relationship detracts proportionably from the credit of the witness. See 2 Hale, 276. Gilb. Ev. 149. 155.

The defendant may be cross-examined as to his being interested; see 1 Esp. 409; and indeed it may be doubted if you would be allowed to prove his interest in any other way, until you had first cross-examined him upon the subject. If he acknowledge that he was once interested, he will be allowed afterwards to prove that his interest has determined, without producing the instrument by which his interest was so determined; 1 Esp. 160. 164. See 2 Stark. 433. 2 Camp. 14; but if his interest have been proved by other witnesses, the instrument which has determined it must be produced. And in all cases where a release is necessary, to give competency to a witness, the release must be produced and proved, or secondary evidence given of it, as in ordinary cases. See 1 Camp. 37.

From their integrity.] A conviction for treason, felony, piracy, *præmunire*, perjury, forgery, conspiracy, barretry, and the like, we have seen (ante, p. 94,) renders a witness incompetent; but the commission alone of such offence, without conviction, see 11 East, 309, and the commission of all other offences, which import falsity or fraud, whether
[101] followed up *by conviction or not, affect the credit of the witness. If the witness have been convicted of the crime, you may give in evidence the record of his conviction; or if he have not, or indeed whether he has been convicted or not, you may call witnesses to speak as to his general character, although not as to any particular offence of which he may be guilty. 2 Hawk. c. 46. s. 20. 4 St. Tr. 693. 2 Stark. 149. As to cross-examining the witness himself upon the subject of any offence imputed to him, there seems to be a difference of opinion among the judges upon the point: some hold that you cannot ask a question of a witness, the answer to which in the affirmative would subject him to punishment; others, that you may ask the question, but that the witness is not bound to answer it; and others, I believe, include in the rule, not only questions, the answers to which might subject the witness to punishment, but also all those where the witness by his answer might be obliged to allege his own infamy or turpitude, although they might not subject him to any punishment. In R. *v.* Holding & Wade, O. B. June, 1821, Bayley, J. held that a witness may be asked a question, the answer to which may subject him to punishment, but he is not compellable to answer it; all other questions for the purpose of impeaching a witness's character, may not only be put, but must be answered. If the witness be examined as to the offence imputed to him, and deny it, such denial is conclusive, and you cannot afterwards call witnesses or offer other evidence to contradict him. 2 Stark. 149. et seq. 2 Camp. 637. Or if general evidence be given of the bad character of a witness, the opposite party may cross-examine the witnesses as to the grounds of their opinion, if he

think it prudent to do so; or he may call witnesses who can speak to the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross-examination.

In *The Queen's case*, it was holden that where a witness for a prosecution has been examined in chief, the defendant cannot afterwards give evidence of any declarations by such witness, or of acts done by him, to procure persons corruptly to give evidence in support of the prosecution, unless he have previously cross-examined such witness as to such declarations or acts. 2 Brod. & Bing. 311.

From their veracity.] The character of a witness for habitual veracity, is an essential ingredient in his credibility: a man who is capable of uttering a deliberate falsehood, is in most cases capable of doing so, under the solemn sanction of an oath. If therefore it appear that he has formerly said or written contrary to that which he has now sworn, (unless the reason of his having done so be very satisfactorily accounted for,) his evidence should not have much weight with a jury; *and [102] if he have formerly sworn the contrary, that fact (although no objection to his competency, R. *v.* Teal, 11 East, 309, unless he have been convicted of the perjury, see ante, p. 94,) is almost conclusive against his credibility. In strictness you cannot ask a witness if at a former trial he swore differently from what he is now swearing; but you should give in evidence an examined copy of the record of the former trial, or at least the *nisi prius* record (if the cause have been tried at *nisi prius*.) Barnes, 449. 2 Stark. 364, and then prove what the witness swore at that trial, either by having it read from the judge's notes, or proved upon oath from the notes or recollection of any person who was present at the time. 3 Taunt. 262. 12 Mod. 318. Gilb. Ev. 68, 69. Or, if the former declaration of the witness were not made by him as witness in a cause, yet if it were in writing, it is irregular to question him as to the contents of it; you should produce it, ask him if it be his handwriting, and then give it in evidence. In *The Queen's case*, it was holden that in cross-examining a witness, you cannot state to him the contents of a letter, and then ask him if he ever wrote such a letter; but you should shew him the letter, ask him if it be of his handwriting, and if he admit it, then give the letter in evidence. Or you may shew him part of the letter, and ask him if he wrote that part; but if he do not admit that he wrote it, you cannot then proceed to cross-examine him as to the contents of the letter; *The Queen's case*, 2 Brod. & Bing. 286; nor even if he admit it to be his handwriting, can you question him whether statements, such as you suggest to him, are contained in the letter; but the entire letter must be given in evidence. Id. 288. But if such former declaration were not in writing, but merely by parol, and not made by him as witness in the cause, in that case you may cross-examine him on the subject of it, and if he deny it, you may call another witness to prove it. If however a witness, when examined in chief as to the occurrence of a fact, answer that he does not remember it, the counsel on the opposite side cannot give evidence of a former declaration by the witness of the fact having occurred, unless he have in cross-examination questioned the witness as to such declaration; for the fact may have occurred, and the witness have formerly declared his knowledge of it, and yet he may not recollect it at the time of his examination. *The Queen's case*, 2 Brod. & Bing. 299. It may be necessary, however, to state, as a general rule, that a witness cannot be cross-examined as to any distinct collateral fact, not relevant to the matter in issue, for the purpose of disproving the truth of the expected

answer by other witnesses, in order to discredit the whole of his testimony. Spenceley *v.* Willot, 7 East, 108.

A consideration of the probability of the fact, also, may aid us
[103] in forming a judgment of the credit that should be given to *a witness for veracity. If he tell us of a fact having occurred, which is contrary to common experience and observation, it will require that his integrity, veracity, and means of knowledge, should be indisputable, to induce us to believe it; but if, on the contrary, the fact stated by him be very likely to have happened, we may be induced to believe it, without very scrupulously inquiring into his character for integrity, veracity, &c. The strength of the evidence should always be great in proportion to the improbability of the fact to be established by it.

From their being sworn to speak the truth.] No credit whatever shall be given to the testimony of a witness, examined *viva voce* in a court of common law in this country, unless he have previously been sworn to speak the truth. Even a peer, who in a court of equity is allowed to give in his answer without oath, merely pledging his honour for the truth of it, must be sworn if examined as a witness. W. Jones, 153—155. Cro. Car. 64. 2 Mod. 99. 2 Salk. 513. 1 P. Wms. 146.

The form of the oath varies according to the religion or country of the witness. See Cowp. 382. Christians are sworn on the New Testament; Jews, on the Old Testament; Mahometans, on the Koran; and persons of other religions, according to the form prescribed for that purpose by the religion they profess. Bul. N. P. 292. Christians are sworn with their hats off; Jews, with their hats on. Even among the different sects of Christians there may be a variance in the manner of taking the oath; a Scotch Covenanter, for instance, instead of kissing the book, as is done by other sects of Christians, holds up his hand, whilst the book lies open before him. 1 Leach, 319. Cowp. 382. and see Peake, 23. 155. Each witness swears in the particular form prescribed by his religion: the only general rule that can be laid down upon the subject, is, that the oath be such as the witness deems obligatory upon his conscience. And a witness may be asked, after he is sworn, whether he considers the oath he has taken obligatory upon his conscience; but if he answer in the affirmative, his answer is conclusive, and he cannot further be asked whether there be any other mode of swearing more binding upon his conscience than that which has been used. *The Queen's case*, 2 Brod. and Bing. 284. The more correct and proper way, however, is, to ask the witness, before he is sworn, whether he considers the oath he is about to take, obligatory upon his conscience, 2 Brod. and Bing. 284. A witness, however, may be asked if he believe in the being of a Deity, and in a future state of rewards and punishments; but he cannot be questioned as to the particular tenets of his religion. See Peake, 11. 1 Leach, 482.

It may be necessary to add, that in civil cases, a quaker may
[104] make an affirmation, 7 & 8 W. 3. c. 34, 22 G. 2. c. 46. s. 36, 37, *and a Moravian a declaration, 22 G. 3. c. 30, instead of an oath. But it is expressly provided by these statutes, that the Quaker or Moravian shall not thereby be enabled to give evidence in criminal cases, or to serve on juries, unless he be actually sworn.

4. *The number of Witnesses requisite.*

At common law, one witness was sufficient in all cases (with the exception of perjury), both before the grand jury and at the trial. 2 Hawk. c. 46. s. 2. Fost. 233.

In high treason not relating to the coin or seals, two witnesses are required, both before the grand jury and at the trial, both of the witnesses to the same overt act, or one of them to one overt act, and another of them to another overt act of the same species of treason; unless the defendant shall willingly, without violence, confess the same. 7 & 8 W. 3. c. 3. s. 2. 1 Ed. 6. c. 12. s. 22. 5 & 6 Ed. 6. c. 11. s. 12. And if the jury do not give credit to both of the witnesses, the defendant shall be acquitted. Per Scroggs, C. J., in R. *v.* Palmer, 3 St. Tr. 56. But one witness is sufficient to prove a collateral fact, Fost. 242, as, for instance, to prove that the defendant is a natural born subject, R. *v.* Vaughan, 5 St. Tr. 29, or the like.

In high treason, relating to the coin or seals, one witness is sufficient, as at common law. Fost. 239. 1 Hale, 221. 1 & 2 Ph. & M. c. 10. s. 12. & c. 11. s. 3.

In petit treason, there must be two witnesses, unless the defendant willingly and without violence confess the offence. 1 Ed. 6. c. 12. s. 22. And the same, in misprision of treason. Id.

Upon an indictment for perjury, there must be two witnesses; one alone is not sufficient, because there is in that case only one oath against another. 10 Mod. 194. But if the assignment of perjury be directly proved by one witness, and strong circumstantial evidence be given by another, or be established by written documents, this would perhaps be sufficient, although it does not appear as yet to have been so decided. Also, if the perjury consist in the defendant's having sworn contrary to what he had before sworn upon the same subject, this is not within the rule above mentioned; for the effect of the defendant's oath in the one case, is neutralized by his oath in the other; and proof by one witness will therefore make the evidence against the defendant preponderate.

In all other cases, one witness is sufficient.

5. *Process against Witnesses.*

In cases of felony, the witnesses are usually bound over by recognizance to appear at the trial and give evidence; and if *they [105] do not appear accordingly, the recognizance may be estreated, and the penalty levied. In cases of misdemeanor, also, the witnesses are often bound over in the same manner.

But in all cases where the witnesses are not so bound over, and you are not certain that they will attend voluntarily, you may compel their appearance at the trial, by *subpœna*, &c. In ordinary cases the common *subpœna* is sufficient. It may be sued out either at the crown office in London, R. *v.* Ring, 8 T. R. 585, or with the clerk of the peace or clerk of assize of the court in which the defendant is to be tried. It is sometimes more advisable to sue it out at the crown office, on account of the readiness with which you may proceed afterwards against the witness by attachment, in case of his non-attendance. See the form of the subpœna, 1 Burn, J. 758. The names of four witnesses may be inserted in one writ. Cowp. 846. As soon as you have obtained the writ, make out a *subpœna* ticket for each witness; See the form, 1 Burn, J. 758; and serve it upon him personally, at the same time shewing him the writ. The service should be personal; for otherwise if he disobey the *subpœna*, he cannot be proceeded against as for a contempt. 2 Str. 1054. And it should be served a reasonable time before the trial; 1 Str. 510; but if the witness be in court at the time of the trial, a service of the *subpœna* ticket upon him there, would perhaps be deemed

sufficient, if he were subpœna'd upon the part of the defendant, see Cowp. 845. 1 W. Bl. 36, and would certainly be sufficient, if he were subpœna'd upon the part of the prosecution.

What we have now mentioned, relates to the service of a *subpœna*, where the witness is in England. But by stat. 45 G. 3. c. 92, the service of a writ of subpœna in any one part of the United Kingdom, shall be as effectual to compel the appearance of a witness in any other part of the same, as if the *subpœna* were served in that part of the same in which the defendant is required to appear: and in case of non-attendance, the court, from which the *subpœna* issued, may transmit a certificate thereof in the manner pointed out in the statute: and the court to which it is so transmitted, may punish the party for his default, in like manner as if he had refused to appear to a *subpœna* issuing out of that court; provided it appear that a reasonable and sufficient sum of money, to defray the witness's expenses of coming, attending to give evidence, and of returning, were tendered to him, at the time he was served with the *subpœna*. Where the *subpœna*, however, is served in England, a tender of expenses does not seem to be necessary, 2 Hawk. c. 46. s. 173, those expenses being otherwise provided for; *vide post;* yet if the witness be so poor as not to be able to go to the assizes or sessions at his own ex-
[106] pense, the expenses not having been tendered, would *probably be deemed by the court, a sufficient excuse for his non-attendance.

If any person (not being the defendant) have in his possession a written instrument which may be requisite as evidence in the cause, then instead of the common *subpœna*, you must serve him with a *subpœna duces tecum*, commanding him to bring it with him, and produce it at the trial. See the form, Tidd, Forms, 217. s. 18. 1 Sellon, 452. It is sued out, and served, in the same manner as the common *subpœna*. Upon being served with this *subpœna*, the witness must attend at the trial with the instrument required, and produce it in evidence, unless he have some lawful or reasonable excuse for withholding it; of the validity of which excuse the court, and not the witness, is to judge. 9 East, 473, and see 5 Esp. 90. It is no excuse that the legal custody of the instrument belongs to another, if it be in the actual possession of the witness; Id. 1 Camp. 14, 180 n. 6 Esp. 116. 1 Holt, 239; but if it tend to criminate himself, see 1 Esp. 105, or his client (if the witness be an attorney) 4 Bur. 1637, see ante, p. 98, the court will not compel him to produce it. If the witness, instead of bringing the papers, &c. required, deliver them to the opposite party, by whom they are withheld, the court will allow secondary evidence of the contents of them to be given, without a notice to produce the originals. 4 Esp. 255.

If the witness be in custody at the time of the trial, the only way of bringing him into court, to give evidence, is by *habeas corpus ad testificandum*. This writ is obtained upon motion in court, or application to a judge at chambers, founded upon an affidavit, stating that he is a material witness, and willing to attend. See R. *v.* Layer, 8 Mod. 86. See the form, Tidd, Forms, 218. § 19. 1 Sellon, 452. The court will thereupon make a rule, or the judge grant his *fiat* for the writ. *Ingross the writ on a 5s. stamp; see the form,* Tidd, Forms, 218. § 21; *and get a judge's name indorsed on it.* Cowp. 672. *It must be directed to the officer in whose custody the witness is. As soon as you get the writ signed, &c., leave it with the officer to whom it is directed; pay, or tender to him his reasonable charges for bringing up the witness, and he will bring him into court on the day of trial, according to the exigency of the writ.* A prisoner in execu-

tion may now be brought up in this manner to give evidence, 2 L. Raym. 851. 3 Bur. 1440, although it was formerly holden otherwise. Barnes, 222. Comb. 17. 48. So, a sailor on board a king's ship may be brought up by this writ, if he have been previously subpœna'd, and be willing to attend. Cowp. 672. But the court will not grant this writ, to bring up a prisoner of war; the proper way of proceeding in that case, is by application to the secretary of state. Doug. 420. So, where the application appeared to be a mere contrivance *to remove a [107] prisoner in execution, the court refused to grant it. 3 Bur. 1440.

Also, by stat. 44 G. 3. c. 102, the judges of the court of King's Bench or Common Pleas, or the barons of the exchequer, or justices of oyer and terminer, or jail delivery, (being such judge or baron) may award writs of *habeas corpus*, for bringing a prisoner detained in any jail or prison before any of the said courts, or before any sitting of *nisi prius*, or before any other court of record, to be there examined as a witness before the grand, petit, or other jury, in all causes civil or criminal. And the like authority is given by the same statute to the justices of great session in Wales, and of the county Palatine of Chester, within the limits of their respective jurisdictions.

Privilege of witnesses from arrest.] A person subpœna'd as a witness, or bound over by recognizance, either to prosecute or give evidence, enjoys a privilege from arrest whilst attending the court, not only on the day mentioned in the *subpœna*, *&c.*, but also on every day of the same sittings, assizes, or sessions, until the cause is tried; he is also privileged in like manner, during a reasonable time, before and after the trial, whilst coming to or returning from the place where the sittings, assizes, or sessions are held. See Arch. Pr. B. R. 69, 70. 151, 152. And this privilege has also been holden to extend to witnesses attending voluntarily, and not subpœna'd. See 1 H. Bl. 636. If a witness under these circumstances be arrested, the court out of which the *subpœna* issued, or the judge of the court in which the cause has been or is to be tried, will, upon application, order him to be discharged. 1 Arch. Pr. B. R. 69, 70. 151, 152.

Penalty for non-attendance.] Where a *subpœna*, sued out at the crown office, has been served upon the witness, and he do not attend at the sessions or assizes, &c. in obedience to it, the court of King's Bench, upon application, will grant an attachment against him, R. *v.* Ring, 8 T. R. 585, provided the witness were served personally with the *subpœna*, 2 Str. 1054, Hardw. 313, and were served a reasonable time before the trial; 1 Str. 510. And see 1 Marshal, 410; and this, whether the cause were in fact called on or not. 3 Barn. & Ald. 598. It is doubtful whether the justices at session, &c. have authority to issue an attachment; the only mode of proceeding against the witness in such a case, seems to be by indictment. As to the mode of proceeding, where the *subpœna* has been served in Ireland or Scotland, see ante, p. 105. and stat. 45 G. 3. c. 92.

*6. *Witnesses' Expenses.* [108]

At common law, a witness in criminal cases was not entitled to his expenses, 2 Hawk. c. 46. s. 173, at least, if he attended upon the part of the prosecution. This is now regulated by statute.

By stat. 27 G. 2. c. 3. s. 3, and 18 G. 3. c. 19. s. 8, where a person shall appear on recognizance or *subpœna*, to give evidence as to any grand or petit larceny, or other felony, whether a bill of indictment have been preferred or not, the court may order the treasurer of the county or division, in which the offence was committed, to pay him such sum as to the

court may seem reasonable, for his expenses, and (if he appear to be in poor circumstances) for his trouble and loss of time.

And by stat. 58 G. 3. c. 70. s. 4, in cases of felony, the court are empowered (at the request of any person bound to prosecute, or subpœna'd to give evidence, and who shall appear accordingly, or who shall appear to have been active in the apprehension of a person accused of certain offences, and for the apprehending and prosecuting of whom to conviction rewards had been before given, by stat. 4 W & M. c. 8. s. 2, 7 W. 3. c. 17. s. 9, 5 A. c. 31. s. 1, 14 G. 2. c. 6. s. 2, 15 G. 2. c. 28. s. 7,) to order the sheriff or treasurer of the county to pay the prosecutor and witnesses, and the person concerned in such apprehension, as well the expenses the prosecutor shall have been put to in preferring the indictment, as also such sum as to the court shall seem reasonable and sufficient to reimburse them their expenses in attending before the grand jury, and in carrying on the prosecution, and also to compensate them for their trouble and loss of time in the apprehension and prosecution. Provided (by sect. 8) that no person shall be entitled to such costs or expenses for attending the court, unless he shall have been bound by recognizance, or have received a *subpœna* to attend, or a written notice for that purpose from the prosecutor, his agent or attorney.

7. *Examination of Witnesses.*

It may be necessary to premise, that when the cause is called on or at any other period during the trial, the court, at the request of the defendant, R. *v.* Vaughan, Holt, 689, 5 St. Tr. 20, and see 4 St. Tr. 191. S. P., or indeed at the request of either party, will order such of the witnesses of the opposite party as have not yet been examined, or who are not under examination, to leave the court until they shall be called for in their order, so that each witness may be examined out of the hearing of the other witnesses on the same side, who are to be examined after him.

[109] **Examination.*] After the witness has been sworn, the counsel for the party who calls him, proceeds to examine him. In doing this, two things are principally to be attended to; 1st, that the questions be pertinent to the matter immediately in issue; and 2dly, that they be not leading questions.

First, the questions must be pertinent to the matter immediately in issue; no question should be asked of a witness upon a direct examination, the probable answer to which cannot have a tendency to prove the offence or defence, or other matter put in issue by the pleadings. In the case of circumstantial evidence, the court of necessity allow of a greater latitude in this respect; but still in this case, the questions must be such as are likely to elicit evidence of facts from which the jury may reasonably presume the guilt or innocence of the prisoner. Upon an indictment for a conspiracy, general evidence of the conspiracy charged, may be received in the first instance, although it cannot effect the defendant, unless afterwards brought home to him or to an agent employed by him. *The Queen's case*, 2 Brod. & Bing. 302. And the same rule applies, where a defendant seeks by such general evidence, in the first instance, to effect the prosecutor with a conspiracy to suborn witnesses for the destruction of the defence (provided the proposed evidence be previously opened to the court), as in the case of a prosecution for a conspiracy. Id. So, if A. commit a burglary, and B. stay outside the house for the purpose of preventing interruption; upon the trial of B., the prosecutor first proves the

offence committed by A., and then brings the guilt home to B. by proving his share of it. In these cases, however, the matter to be proved, naturally branches itself into two propositions: that a certain conspiracy existed, and that the defendant was engaged in it; that A. committed the burglary, and B. aided and assisted him in the commision of it.

Secondly, It is a general rule, that in a direct examination of a witness, he shall not be asked leading questions, or, in other words, questions framed in such a manner as to suggest to the witness the answers required of him. To this rule, however, there are a few exceptions: to identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked in direct terms, if that be not the person he meant. R. *v.* Watson, 2 Stark. 116. Where a witness swears to a certain fact, and another witness is called for the purpose of contradicting him, the latter may be asked in direct terms, whether that fact ever took place. 1 Camp. 43. So, if the witness appear evidently to be hostile to the party who has called him, the counsel may put leading questions to him, having first obtained permission of the court to do so. Peake, Ev. 198. 1 Ph. Ev. 283. And lastly, questions which are merely introductory to others *that are material, are in general [110] allowed to be asked in direct terms, without objection.

If an irrelevant or leading question be put, the counsel on the other side should immediately interpose, and object to it. So, if a witness be asked whether a certain representation was made, the opposite counsel may interpose, and ask him whether the representation in question, were by parol or in writing; for if the latter, the writing must be produced. *The Queen's case.* 2 Brod. & Bing. 292.

We have seen (ante, p. 93,) that a witness can be allowed only to speak of facts within his own knowledge and recollection; except in matters of science, in which case his opinion is admissible evidence. He cannot therefore be admitted to read his evidence; 5 St. Tr. 455; but he will be allowed to refresh his memory from any book or paper, if he can afterwards swear to the fact from his recollection. 3 T. R. 749. and see 2 Camp. 112. If he know the fact, however, only from seeing it in the book or paper, the original book or paper must be given in evidence and proved by other means. 3 T. R. 749. In like manner, depositions made by an old witness, have been allowed to be read to him, for the purpose of refreshing his memory as to dates, &c. 1 Esp. 440.

It may be necessary to observe here, that when a witness is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness. 2 Camp. 280.

Cross-Examination.] When the direct examination is finished, the witness may then be cross-examined by the counsel for the opposite party. Or, if the party calling a witness, do not think proper to examine him after he is called and sworn, the witness may nevertheless be cross-examined by the counsel for the opposite party. R. *v.* Brooke, 2 Stark. 472. See Id. 314, and 1 Esp. 357. S. P.

When a witness is produced, the first thing that claims the attention of the counsel for the opposite party, is, whether the witness be competent; and if not, then in what manner the objection to his competency must be made. See ante, p. 93—99.

Formerly it was holden that the objection for incompetency, must have been made before the witness was sworn in chief; but it may now be made at any time during the trial. 1 Esp. 37. 1 T. R. 717. However, it is still in many cases desirable to make the objection before the wit-

ness has been examined in chief, and if he can be examined as to it, to examine him on the *voire dire*.

The next thing that claims the opposite counsel's attention,
[111] in the course of the examination, is, whether parol *evidence be the best evidence of the facts to which the witness deposes; and, if not, whether grounds have been laid for its admission as secondary evidence; whether the questions be relevant and pertinent to the matter in question; and whether they be leading questions. If the evidence of the witness be objectionable in any of these respects, the counsel should immediately interpose, and make his objection.

Supposing, however, the witness and his evidence not open to these preliminary objections, the opposite counsel must then proceed to cross-examine him, if in his judgment a cross-examination be necessary or advisable. In giving his evidence, a witness tells the truth, wholly, or partially, or tells a falsehood. If he tell the whole truth, a cross-examination may be dangerous, as it may have the effect of rendering his story more circumstantial, and impressing the jury with a stronger opinion of its truth; it is better, in such a case, either not to cross-examine him at all, or to confine your questions to his credibility, by impugning his means of knowledge, his disinterestedness, his integrity, or his veracity. See ante, p. 99—104.

If the witness tell only part of the truth,—then the opposite counsel, if the residue be favourable to his client, will immediately proceed to cross-examine him as to it; but if unfavourable, the counsel will either refrain altogether from cross-examining him, or will confine his questions to the witness's credibility, as above mentioned.

If, on the other hand, the evidence of the witness be false, then the whole force of the cross-examination must be directed to his credibility; See ante, p. 99—104; and you may afterwards prove the truth by other witnesses.

In cross-examining a witness, the counsel may ask him leading questions: that is, he may lead the witness so as to bring him directly to the point on which he requires the answer; but he will not be allowed to put into the witness's mouth the very words he is to echo back again. Per Buller, J., in R. *v.* Hardy, 24 How. St. Tr. 755. The questions, however, must be either relevant and pertinent to the matter in issue, or calculated to elicit the witness's title to credit.

When in cross-examining a witness, you show him a letter, and he admits it to be of his handwriting, the ordinary course is to have the letter read as part of your evidence after you have opened your case. But if it become necessary to have the letter read, in order to found certain questions, with relation to the contents of the letter, to be propounded to the witness, the court, upon application, will allow the letter to be read at the time of the cross-examination, subject of course to the consequences of the letter's being considered as part of your evidence. *The Queen's case*, 2 Brod. & Bing. 288.

[112] *If, upon the trial of an indictment, it appear upon cross-examination of one of the witnesses for the prosecution, that J. S. was employed by the prosecutor, for the purpose of procuring and examining evidence and witnesses in support of the indictment: the defendant cannot give evidence of J. S.'s having offered a bribe to a certain person, to induce him to give evidence, touching the matter of the indictment, unless such person have been examined as a witness. *The Queen's case*, 2 Brod. & Bing. 302.

Re-examination.] If any new fact arise out of the cross-examination, the witness may be examined as to it, by the counsel who first examined him. In the same manner he may be re-examined, when necessary, in

order to explain any part of his cross-examination. In *The Queen's case*, it was holden, that if a witness, upon his cross-examination, admit his having used certain expressions in a conversation with a person not a party to the cause, the opposite counsel, in re-examining the witness, is confined to such questions as may elicit the meaning of the expressions, and the motives of the witness for using them. But where a witness deposes to certain expressions being used by a party to the cause, the counsel for that party is entitled to re-examine the witness as to the whole of the conversation in which the expressions occurred; because the expressions are given in evidence in such a case, as an admission of the party, and the whole of the admission should be taken together. 2 Brod. & Bing. 294.

*BOOK II.

PLEADING AND EVIDENCE IN PARTICULAR CASES.

PART I.

OFFENCES AGAINST INDIVIDUALS.

CHAPTER I.

Offences against the Property of Individuals.

SECT. 1. *Larceny.*
2. *Embezzlement.*
3. *Cheating.*
4. *Burglary.*
5. *Arson.*
6. *Malicious Mischief.*
7. *Forgery.*

SECT. 1.

LARCENY.

Indictment for Simple Larceny.

MIDDLESEX, to wit: The jurors for our lord the King upon their oath present that J. S. late of the parish of B. in the county of M., labourer, on the third day of May in the third year of the reign of our sovereign lord George the fourth, at the parish aforesaid in the county aforesaid, [*three pair of shoes of the value of twelve shillings, one shirt of the value of four shillings, and one waistcoat of the value of seven shillings*] of the goods and chattels of one J. N. then and there being found, feloniously did steal, take, and carry away: Against the peace of our said lord the King, his crown and dignity.

[114] **Simple larceny at common law, of goods above the value of* 12*d.* (*in which case it is called Grand Larceny*), *is a felony within clergy; but in some instances, such as horse stealing, &c., which shall be mentioned hereafter, the benefit of clergy has been taken away by statute. Where a man commits a robbery or burglary in one county, and he is tried for it as a simple larceny in another county* (*see ante*, p. 5), *and convicted, he shall lose the benefit of clergy, in the same manner as if he were convicted of the burglary or robbery in the proper county.* 25 H. 8. c. 3. s. 3. 3 W. & M. c. 9. s. 3. *And the same in all other causes, where the larceny was originally committed under circumstances, which would deprive the party of the benefit of clergy.* 3 W. & M. c. 9. s. 3.

***Petit larceny** (that is, simple larceny of goods of the value of 12d. or under) is a felony, but was never punishable at common law with death. It is now punishable by whipping or imprisonment, or, by stat. 4 G. 1. c. 11. s. 1, by transportation for seven years.*

Evidence.

J. S. late of, &c.] It is little matter whether this be the correct name and addition of the defendant or not; if he do not plead the misnomer or wrong addition in abatement, he waives all objection to the indictment for any error in this respect. All therefore the prosecutor has to do, is to prove that the defendant is the person who actually committed the offence; which is done either by identifying him as the party who committed it, or by circumstantial evidence. See ante, p. 77, 78.

On the third day of May, &c.] The time and place here stated, need not be proved as laid: if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment, ante, p. 14. 60,—or at any other place, provided it be within the county, or other extent of the court's jurisdiction, ante, p. 14. 61, it will be sufficient. Or if it be proved that the larceny was actually committed by the defendant in another county, and that he carried the goods through or into the county or other extent of the court's jurisdiction, in which he is now indicted, it will be sufficient. Ante, p. 5.

Three pair of shoes, &c.] The species of goods must be proved as laid; for instance, upon this indictment, if the prosecutor were to fail in proving that shoes, or a shirt, or a waistcoat, were stolen, the defendant should be acquitted, although there might be indisputable evidence of his having stolen other articles. See ante, p. 22. 63. But it is not necessary that the prosecutor should prove all the articles, mentioned in the indictment, to have been stolen; if he prove the *defendant [115] to have stolen any one of them, (as, for instance, if he prove that the defendant stole the waistcoat, or the shirt, or one pair of the shoes) it would be sufficient. Ante, p. 22. 63.

The goods taken must appear in evidence to be *personal goods;* for none other can be the subject of larceny at common law.

First, Things real, or which savour of the realty, cannot be the subject of larceny, at common law; and so strict is the rule in this respect, that a larceny cannot be committed even of title deeds, 1 Hale, 510. 1 Hawk. c. 33. s. 35. 2 Str. 1137, or any other charter or writing concerning the realty, R. *v.* Westbeer, 1 Leach, 12, or even of the box in which they are kept. 1 Hale, 510. 3 Inst. 109. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things also that adhere to the freehold, as corn, grass, trees, and the like, or lead, or other thing attached to a house, no larceny can be committed at common law; but the severance of them was, and in many cases still is, a mere trespass, and the subject of a civil action only. But it was always holden at common law, that if the owner, or a stranger sever them, and another man come and steal them,—or if the thief sever them at one time, and that another come and take them away,—it is a larceny. 3 Inst. 109. 1 Hale, 510. And now, stealing, or removing with intent to steal, lead or iron (4 G. 2. c. 32,) or any copper, brass, or bell metal, 21 G. 3. c. 68, fixed to any dwelling house or other building, garden, or court thereunto belonging, is made felony, and punishable by transportation for seven years. To

cut or take away corn growing; to rob an orchard or garden; to break or cut a hedge, fence, &c., or to take up fruit trees, for the purpose of carrying them away; to cut or spoil woods, underwoods, poles, or trees standing; 43 El. c. 7; to steal or destroy turnips, potatoes, cabbages, beans, parsnips, pease, or carrots; 13 G. 3. c. 32. 42 G. 3. c. 67; to steal or destroy madder roots: 13 G. 3. c. 35. s. 5: are punishable, upon a summary proceeding before a magistrate, by whipping, fines, imprisonment, &c. To steal, cut down, bark, or destroy, in the night time, any timber tree, or any roots, shrubs, or plants, of the value of five shillings, is made felony, and punishable by transportation for seven years; 6 G. 3. c. 36; and if done in the day time, is punishable by fines for the first and second offence, and with transportation for the third; 6 G. 3. c. 48. 13 G. 3. c. 33; which statute of 6 G. 3. c. 48, has since been extended to all woods and wood grounds belonging to his Majesty, 45 G. 3. c. 66. s. 1, and to all hollies, thorns, and quicksets in any of his Majesty's forests or chases. 9 G. 3. c. 41. s. 8. And lastly, to steal black lead or black lead ore from mines, or to break into
[116] the mines with intent to steal it, *is made felony, and punishable by imprisonment and whipping, or transportation. 25 G. 2. c. 10.

Secondly, Bonds, bills, &c., being mere *choses in action*, are not the subject of larceny at common law, for they are of no intrinsic value. 8 Co. 33. 1 Hawk. c. 33. s. 35. But now, by stat. 2 G. 2. c. 25. s. 3, to steal any exchequer orders or tallies, or any exchequer bills, South Sea bonds, bank notes, East India bonds, dividend warrants of the bank, South Sea company, East India company, or any other company, bills of exchange, navy bills, or debentures, goldsmith's notes, or other bonds or warrants, bills or promissory notes for the payment of money, is felony, and punishable in the same manner as if the offender had stolen goods to the value of the sum secured by such written instruments, or remaining due thereon. And, by stat. 52 G. 3. c. 143. s. 1, if any officer or servant of the post-office shall secrete, embezzle, or destroy any letter or packet containing the whole or part of any bank note, bill of exchange, &c., or other valuable paper specified in the act, or shall take the same out of any letter or packet; it is made felony, death. Or, if he destroy any letter or packet with which he has received money for the postage, or shall advance the rate of postage on any letter or packet sent by the post, and shall secrete the money received for such advanced postage, it is a felony within clergy. 5 G. 3. c. 25. s. 19. 7 G. 3. c. 50. s. 3.

Thirdly, Larceny at common law cannot be committed of such animals, in which there is no property either absolute or qualified; as of beasts that are *ferœ naturæ*, and unreclaimed, such as deer, hares, and conies, in a forest, chase, or warren; fish in an open river or pond; or wild fowls at their natural liberty. 1 Hale, 511. Fost. 366. But if they are reclaimed or confined, and may serve for food, it is otherwise; for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk or net, and pheasants or partridges in a mew, larceny may be committed. 1 Hale, 511. 1 Hawk. c. 33. s. 39. Swans, it is said, if lawfully marked, are the subject of larceny at common law, although at large in a public river; Dalt. Inst. c. 156; or whether marked or not, if they be in a private river or pond. Id. So, all valuable domestic animals, as horses, and all animals *domitiæ naturæ*, which serve for food, as swine, sheep, poultry, and the like, and the flesh of such as are *ferœ naturæ*, may be the subject of larceny. 1 Hale, 511. But as to all other animals which do not serve for food, such as dogs, and other creatures kept for

whim and pleasure, stealing them does not amount to larceny at common law. 1 Hale, 512. Stealing dogs, however, now renders the offender liable, upon a summary proceeding, to fine or imprisonment and whipping, by stat. 10 G. 3. c. 18. To hunt, snare, shoot at, &c., or carry away any deer in an inclosed ground, is a felony, and subjects the offender to transportation for seven years; 42 G. 3. c. 107. s. 1; or if in *an uninclosed part of a forest, chase, &c., he shall be fined for [117] a first offence, and transported for seven years for a second. Id. s. 2, 4. See also 9 G. 1. c. 22. s. 1.

To take or kill conies in the night time, in any ground used for the breeding or keeping of the same, whether inclosed or not, subjects the offender to transportation for seven years, or to whipping, fine, or imprisonment, at the discretion of the court. 5 G. 3. c. 14. And if a man, armed and disguised, rob a warren or other place where conies or hares are usually kept, it is felony, death. 9 G. 1. c. 22. s. 1. So, if a man, armed and disguised, steal or take away any fish out of a river or pond, it is felony, death. 9 G. 1. c. 22. s. 1. And by stat. 5 G. 3. c. 14. s. 1, entering an inclosed park or paddock, or a garden, orchard, or yard belonging to a dwelling house, and stealing or destroying any fish in a river or other water therein, subjects the offender to transportation for seven years; or if in any other inclosed ground, then to a fine or imprisonment, upon a summary conviction. Id. s. 3. Stealing oysters or oyster brood from an oyster bed, laying or fishery, being private property, is made felony, and punishable by transportation for seven years, or imprisonment, by stat. 48 G. 3. c. 144. s. 1. Stealing hawks, in disobedience to the rules prescribed by stat. 37 Ed. 3. c. 19, it is also felony. 3 Inst. 98.

Of the value of, &c.] It is immaterial whether the goods be proved to be of the value laid in the indictment, or not. Ante, p. 22. 63. If the jury be of opinion that the articles proved to have been stolen, are of a value exceeding 12*d.*, the defendant shall be convicted of grand larceny; if of the value of 12*d.* or under, of petit larceny. And it is necessary to observe, that if it appear to the jury that the several articles mentioned in the indictment were stolen at different times, and that no one of them exceed the value of 12*d.*, or that the goods stolen at any one time did not exceed that value, the defendant can be found guilty of petit larceny only.

Of the goods and chattles of one J. N.] It must be proved upon the trial that the goods stolen are the absolute or special property of the person thus named in the indictment. If he be misnamed, if the name thus stated be not either his real name or the name by which he is usually known, or if it appear that the owner of the goods is another and different person from him thus named as such in the indictment, the variance will be fatal, and the defendant must be acquitted. So, if he be described in the indictment as a certain person to the jurors unknown, and it appear in evidence that his name is known, the defendant will be acquitted. See 3 Camp. 264. 1 Holt, 595. ante, p. 11. 2 East, P. C. 651. 2 Leach, 802.

It has already been observed, that where goods are stolen out *of the possession of a bailee, it may be described in the indict- [118] ment as the property of the bailor or bailee; ante, p. 10. 2 Hale, 181; as, for instance, goods intrusted to a person for safe keeping, or to a carrier to carry, cloth to a tailor to make into clothes, linen to a laundress to wash, goods pawned, and the like, may be laid to be the goods and chattles either of the person to whom they are so intrusted, &c., or of the owner, at the option of the prosecuter. Id. and see 1 Leach, 356. 2 Leach, 875. 2 East, P. C. 652. So, where cattle were alleged in the indictment to be the property of a person, who, it appeared in evi-

dence, was merely the agister, and not the actual owner, the judges held it to be sufficient. R. *v.* Woodward, 2 East, P. C. 653. But if it appear that the person named as owner, is merely servant to the real owner, the defendant must be acquitted; 2 East, P. C. 652; for the servant has not a special property in the goods, the possession of the servant being the possession of the master. So, where the person named as owner, appears to be a married woman, the defendant must be acquitted; because in law the goods are the property of the husband. 1 Hale. 513. ante, p. 63. But where goods were stolen from a feme sole, and before indictment she married, it was holden that describing her as the owner of the goods, by her maiden name, was sufficient. R. *v.* Turner, 1 Leach, 536. Clothes or other necessaries furnished by a father to his child, may it seems be laid to be the property either of the father or of the child, particularly if the child be of tender age; 2 East, 654; but it is safer perhaps to allege it to be the property of the child. See 1 Leach, 463, 464 *n.*

We have seen (ante, p. 10,) that where the goods stolen are the property of partners, they may be described as the goods and chattels of any one or more of the partners, and others his or their partners; 1 Geo. 4. c. 102; and the same where minerals, timber, iron, or other materials are stolen from mines, the property of any mining company. 56 G. 3. c. 73 In all other cases, where joint property is stolen, if it appear in evidence that all the joint proprietors are not named in the indictment (that is, it should seem, all that were joint proprietors at the time the felony was committed), the defendant must be acquitted. But when the goods of a corporation are stolen, they must be laid to be the property of the corporation, in their corporate name, and not in the names of the individuals who compose it; 2 East, P. C. 1059, 1 Leach, 253; and there is a difference upon this subject, between an ancient corporation and a corporation newly erected; an ancient corporation may by use have a special name differing in substance from that by which they were originally incorporated, and they may plead and be impleaded by that name; but a corporation created within memory, must plead and be impleaded by the name by which they were incorporated. Hob. 211. Noy.
[119] 54. 2 Brownl. 292. Latch. 229. 11 Co. *94. Dy. 279. 3 Mod. 6. Cro. El. 351 Abr. Corp. C. 3. and see 10 Co. 87. 1 Leach, 513.

The clothes, furniture, tools, and other things whatsoever, purchased or provided for the use of the poor of a parish, &c., if stolen, must be described as the property of the overseers for the time being. 55 G. 3. c. 137. s. 1. So, timber, stones, and other materials, and tools, &c., purchased by order of justices, or of the surveyor of county bridges, if stolen, must be described as the property of such surveyor for the time being. 43 G. 3. c. 59. s. 3.

Feloniously.] The taking and carrying away, must be felonious; that is, done *animo furandi;* or, as the civil law expresses it, *lucri causâ.* 4 Bl. Com. 232. This indeed is not very definite; but larceny, as far as respects the intent with which it is committed, (and the intent here is a material ingredient in the offence,) may perhaps correctly be defined thus: Where a man knowingly takes and carries away the goods of another, without any claim or pretence of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use. If the sheep of A. stray into the flock of B., and B. not knowing it, drive them home along with his own flock, and shear them, this is no felony; but it would be otherwise if he did any act for the purpose of concealing them, for that would indicate his knowledge of their being the sheep of another. 1 Hale, 506. If under colour of arrear of rent, although none

be actually due, I distrain or seize my tenant's cattle, this may be a trespass, but is no felony. 1 Hale, 509. If I take an estray, upon a claim of right to it as lord of the manor, it is no felony, however groundless my claim may be, Id. If a servant take his master's horse without his knowledge, and bring him home again; if a man take his neighbour's plough, that is left in a field, and use it upon his own land, and then return it: these may be trespasses, but are not felonies, 1 Hale, 509, because the returning the thing taken, sufficiently evinces that the party, when he took it, had no intention to deprive the owner of it, or to convert it to his own use. Returning the goods, however, can be considered merely as evidence of the defendant's intentions when he took them; for if it appear that he took them originally with the intent of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offence. See 1 Hawk. c. 34. s. 2. 1 Hale, 533. In R. *v.* Phillips, & al., 2 East, P. C. 662, 663, it was proved that the defendants took two horses out of the prosecutor's stable at night, without his leave, and having rode them about 30 miles, left them at an inn, desiring care to be taken of them, and saying that they should return in three hours; the defendants were taken, on the same day, at the distance of 14 miles from the *inn, walking in a direction from [120] it: the jury found the defendants guilty, but at the same time found specially that the defendants meant merely to ride the horses the thirty miles and to leave them there, without an intention to return for them or otherwise dispose of them; and ten of the judges held that this was no felony, as there was no intention in the prisoners to change the property, or make it their own.

In all cases of larceny, the questions whether the defendant took the goods knowingly or by mistake, whether he took them *bona fide* under a claim of right, or otherwise, and whether he took them with an intent to return them to the owner, or to deprive the owner of them altogether, and to appropriate or convert them to his own use,—are questions entirely for the consideration of the jury, to be determined by them upon a view of the particular facts of the case.

Take.] There must be a taking of the goods, either actual or constructive, to constitute larceny. Therefore, if there be joint-tenants or tenants in common of a personal chattel, and one of them carry away and dispose of it to his own use, this is no larceny; 1 Hale, 513; there is in fact no taking, for he is already in possession; it is merely the subject of an action of account, or bill in equity. So, if a wife carry away and convert to her own use, the goods of her husband, it is no larceny; for husband and wife are one person in law, and consequently there can be no taking, so as to constitute a larceny. 1 Hale, 514. So, if a man lose goods, and another find them, and not knowing the owner, convert them to his own use, this is no larceny, 3 Inst. 108. 1 Hawk. c. 33. s. 2, even although he deny the finding of them, or secrete them. 1 Hale, 506. But it is otherwise if he know the owner: and therefore, where a bureau was given to a carpenter to repair, and he found money secreted in it, which he kept and converted to his own use, it was holden to be a larceny. Cartwright *v.* Green, 8 Ves. 405. 2 Leach, 952. So, if a hackney coachman convert to his own use, a parcel left by a passenger in his coach by mistake, it is a felony, if he know the owner, or if he took him up or set him down at any particular place where he might have enquired for him. R. *v.* Wynne, 2 East, 664. 1 Leach, 413. R. *v.* Lamb, 2 East, 664. R. *v.* Sear, 1 Leach, 415 n.

We have just now said, that the taking may be actual or constructive: actual, where the goods have been actually taken out of the owner's possession, against his will or without his consent, and which requires no further comment or illustration; constructive, where the owner delivers the goods, but either does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him
[121] by fraud, and in pursuance of a previous intent to steal *them.

As this subject of constructive possession has given rise to some very nice distinctions, it may be necessary to consider it with some minuteness; I shall therefore class the cases decided upon it, under the following heads: 1. Where, by the delivery, the owner of the goods passes not only the possession, but the right of property also; 2. Where the possession has been obtained *animo furandi;* 3. Where the possession was originally obtained *bona fide*, and without a felonious intent; 4. Where the delivery does not alter the possession in law.

First, As to the cases where, by a delivery of the goods, not only the possession, but the right of property also, passes: it is clear that no subsequent conversion by the person in whom the right of property has thus vested, can be construed into larceny, whatever the intent of the party may be. As, for instance, where goods are sold upon credit and delivered, no conversion of them by the vendee can amount to larceny. Where the defendant bought a horse at a fair, of the prosecutor, to whom he was known, and having mounted the horse, said to the prosecutor, that he would return immediately, and pay him, to which the prosecutor answered, "very well;" the defendant rode the horse away, and never returned: this was holden to be no larceny, because the property, as well as the possession, was parted with. R. *v.* Harvey, 1 Leach, 467. So, where the defendant bought goods, and desired them to be sent to him with a bill and receipt; and the shopman who brought them, left them, upon being paid for them by two bills, which however afterwards turned out to be mere fabrications; the judges held that this was not larceny, because the prosecutor had parted with the property as well as the possession, upon receiving what was deemed at the time, by his servant, to be payment. R. *v.* Parkes, 2 Leach, 614. So, where the defendant sent to a hatter, in the name of one of his customers, for a hat, and it was accordingly delivered to the messenger, upon the credit of the customer: the judges held that this was not larceny, the owner having parted with his property in the hat. R. *v.* Adams, 2 Russel, 1060. So, where a woman obtained from the prosecutor, in the name of one of his neighbours, half a guinea's worth of silver, and said that she would return presently with the half-guinea, it was holden not to be larceny, for the same reason. R. *v.* Coleman, 2 East, P. C. 672. So, where the defendant sent a letter to the prosecutor, in the name of another person, requesting a loan of 3*l.* for a few days, and obtained the money accordingly: eleven of the judges held this to be no felony, because it appeared that the property in the money was intended to pass by the delivery.
R. *v.* Atkinson, 2 East, P. C. 673. Where the prosecutor was
[122] inveigled by a set of sharpers to bet with them, and by a *preconcerted trick, one of them won from him the money in question, and which he paid, imagining it to have been won fairly: the judges held that this was no larceny, the prosecutor having parted with his property in the money, under an idea that it had been fairly won. R. *v.* Nicholson, et al. 2 Leach, 610.

Secondly, Where the possession of the goods has been obtained *animo furandi.* Where a man, having the *animus furandi* (see ante, p. 119,)

obtains, in pursuance thereof, possession of the goods by some trick or artifice: this is considered such a taking (even although there be a delivery in fact) as to constitute larceny. Where the defendant offered to give the prosecutor gold for bank notes, and, upon the prosecutor's laying down some bank notes for the purpose of having them changed for gold, the defendant took them up and went away with them, promising to return immediately with the notes, but never in fact returned: Wood, B. left it to the jury to say, whether the defendant had the *animus furandi* at the time he took the notes, and said, that if they were of that opinion, the case clearly amounted to larceny. R. *v.* Oliver, 4 Taunt. 274, cit. Where the defendant agreed to discount a bill for the prosecutor, and the bill was given to him for that purpose; he told the prosecutor that if he then sent a person with him to his lodgings, he should give him the amount, deducting the discount and commission; a person was sent accordingly, but upon reaching the lodgings, the defendant left the messenger there, and went out on pretence of getting the money, but never returned: the judge left it to the jury to say whether the defendant obtained possession of the bill with intent to steal it, and whether the prosecutor meant to part with his property in the bill, before he should have received the money for it; the jury, being of opinion in the affirmative on the first proposition, and in the negative on the second, convicted the prisoner, and the judges afterwards held the conviction to be right. R. *v.* Aickles, 2 East, P. C. 675. So, obtaining money or goods by the practice of *ring-dropping* (as it is termed,) has been holden to be larceny. Thus, where the defendant, in the presence of the prosecutor, picked up a purse in the street, containing a receipt for £147, for a "*rich brilliant diamond ring*," and also the ring itself; it was then proposed, that the ring should be given to the prosecutor, upon his depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the value of it should be paid to him by the defendant; the prosecutor accordingly deposited his watch and money, which were taken away by some of the defendant's confederates; but the ring turned out to be of the value of 10*s.* only, and the watch and money were never returned: it was left to the jury to say whether this was not an artful and preconcerted scheme to get possession of the prosecutor's *watch and money; and the jury being [123] of that opinion, convicted the defendant. R. *v.* Patch, 1 Leach, 238. In R. *v.* Moore, (1 Leach, 314. 2 East, P. C. 679.) the defendant being convicted of larceny, under the same circumstances, and the case being reserved for the opinion of the judges, nine of them were of opinion, that this practice of ring-dropping, amounted to larceny: and they distinguished it from the case of a loan; for here, although the possession was parted with, the property in the goods was not. See R. *v.* Watson, 2 Leach, 640. 2 East, P. C. 680, S. P. by all the judges.

Where a hosier, by the desire of the defendant, took a parcel of silk stockings to his lodgings, out of which the defendant chose six pair, which were laid on the back of a chair; the defendant then sent the prosecutor back to his shop for some articles, and while he was absent, he absconded with the stockings: the judges held that this amounted to larceny, the defendant having clearly obtained possession of the goods *animo furandi*. R. *v.* Sharpless, et al. 1 Leach, 93, 2 East, P. C. 675. Where the defendant hired a horse from the prosecutor, on pretence of taking a journey, and it turned out that, instead of going the journey, he sold the horse in Smithfield market, on the same day: it was left to the jury to consider, whether the defendant hired the horse for the purpose of

stealing it, or whether he hired it really for the purpose of taking the journey, and afterwards changed his intention; and the jury being of the former opinion, found him guilty. Seven of the judges were afterwards clearly of opinion that the offence was felony. R. *v.* Pear, 1 Leach, 212, 2 East, P. C. 685. And the same, where the defendant hired the horse in the name of another person. R. *v.* Charlewood, 1 Leach, 409, 2 East, P. C. 689. So, where the defendant hired a post chaise, with intent to convert it to his own use, and never returned it; upon being indicted for it, twelve months afterwards, as for a larceny, it was holden clearly to amount to that offence, although the chaise was not hired for any definite time. R. *v.* Semple, 1 Leach, 420. If a man, *animo furandi*, sue out a replevin, and by that means obtain the possession of another man's horse, and ride away with it; or if by a fraudulent ejectment he get possession of another's house, and carry away the goods out of it; he is guilty of larceny. 1 Hale, 507. 1 Hawk. c. 33. s. 12. 3 Inst. 108. and see R. *v.* Farr, et al. Kel. 43. 2 Leach, 1043 n. Where the defendant, by artifice, obtained possession of a request note at the India House, by means of which he obtained a permit for a chest of tea belonging to the prosecutor (to whom he was a perfect stranger,) and the chest of tea was therefore delivered to him: the judge held this to be larceny, notwithstanding the possession had been obtained by means of a regular
[124] request note and permit. R. *v.* Hench, 2 Russel, *1072. A hosier in the Haymarket, having sent his apprentice with a parcel of stockings to Cheapside, the defendant met him on Ludgate Hill, and asked him where he was going; the apprentice answered, to Mr. Heath's; the defendant replied, that he was the person, desired the boy to give him the parcel, and gave him a small parcel in return to take home to his master; the boy accordingly gave him the parcel, but the parcel he took from him for his master, contained nothing but old rags of no value: the judges held this to be larceny. R. *v.* Wilkins, 1 Leach, 520, 2 East, P. C. 673. It must be owned, that these two last cases so nearly resemble a few of the latter cases collected under the last head, that the reader will probably feel some difficulty in distinguishing them upon principle. They may be considered as very nearly approaching the boundary which separates the one class of cases from the other.

Thirdly, As to the case where the possession of the goods has been obtained *bonâ fide*, without any fraudulent intention in the first instance. Where goods are delivered to a man upon trust, or taken by him with the owner's consent, he is not guilty of larceny by converting them to his own use. Even if the goods of a husband be taken with the consent or privity of the wife, it is not larceny. R. *v.* Harrison, 1 Leach, 47. However, it is said, that if a woman steal the goods of her husband, and give them to her avowterer, who, knowing it, carries them away, the avowterer is guilty of felony. Dalt. c. 104. Where the defendant saved some of the prosecutor's goods from a fire which happened in his house, and took them home to her own lodgings; but the next morning she concealed them, and denied having them in her possession: the jury finding that she took them originally merely from a desire of saving them for, and returning them to, the prosecutor, and that she had no evil intention until afterwards; the judges held, that it was a mere breach of trust, and not a felony. R. *v.* Leigh, 2 East, P. C. 694. If A. lend B. a horse, and he ride away with him, or if I send goods by a carrier, and he carry them away; or if any other bailee convert the goods bailed, to his own use: it is not larceny; because the original taking was *bonâ fide*, and without fraud. 1 Hale, 504. 1 Hawk. c. 33. s. 2. But this rule applies, only

while the contract of bailment continues ; for if that be determined, and the conversion take place afterwards, it will amount to larceny. As, for instance, if a carrier take the goods to the place appointed, and afterwards take them away and convert them, it is larceny. 3 Inst. 107. If a man *bona fide,* hire a horse to go a journey of three miles, but instead thereof go one hundred miles, and sell the horse, it is larceny ; because the contract of bailment was determined at the end of the three miles. R. *v.* Tunnard, 2 East, P. C. 687, 694. and see R. *v.* *Charlewood, 1 Leach, 409, 2 East, P. C. 689. So, if a carrier open a [125] bale or pack of goods, or pierce a vessel of wine, and take away part thereof, he is guilty of larceny ; 3 Inst. 107. 1 Hale, 505 ; for by this tortious act, the contract of bailment is determined. Id. and see Kel 82, 83

Fourthly, As to cases where, although there is a delivery of the goods by the owner, yet the possession in law remains in him. If a servant, who has merely the care and oversight of the goods of his master as the butler of plate, the shepherd of sheep, and the like, embezzle them, this is a larceny at common law ; 1 Hale, 506 ; because the goods, at the time they are taken, are deemed in law to be in the possession of the master, the possession of the servant in such a case being the possession of the master. Where the defendant, who was carter to the prosecutor, went away with, and disposed of, his master's cart, it was holden to be felony. R. *v.* Robinson, 2 East, P. C. 565. Where the defendant, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and instead of doing so, sold them : the judges held this to be felony. R. *v.* Bass, 2 East, P. C. 566. The defendant, foreman and shopkeeper to the prosecutor, not residing in the house with him, but merely attending there in the day time, received from his master a bill of exchange, with directions to send it inclosed in a letter to J. S. in London ; the defendant absconded with the bill ; and the judges held this to be felony. R. *v.* Paradice, 2 East, P. C. 565. So, if a man having purchased corn on board a vessel, send his clerk or lighterman with a barge for the purpose of landing it, and the clerk or lighterman embezzle a part of it, this is larceny. R. *v.* Abrahat, 2 Leach, 824. R. *v.* Spear, 2 Leach, 825, 2 East, P. C. 568. So, where a servant got ten guineas from her master, in order to get silver for them, and, instead of doing so, ran away with the guineas ; it was holden to be larceny. 1 Leach, 302. Even where a confidential clerk to a merchant, who had authority to get his master's bills discounted, and had the general management of his cash concerns, took a bill of exchange unindorsed, got it discounted, and absconded with the produce of it, it was holden to be felony. R. *v.* Chipchase, 2 Leach, 699. and see R. *v.* Murray, 1 Leach, 344. Where the defendant, a clerk and cashier in a banking house, made false entries in the books to the credit of a customer, then obtained the customer's cheque for the sum thus falsely placed to his credit, and paid the amount of the cheque to himself by certain bank notes, entering the payment in the book, as being made, to 'a man' : this was holden by the judges to be a larceny of the bank notes. R. *v.* Hammon, 4 Taunt. 804. But where goods, of which the master has never been in possession, are delivered to the servant for the master's use, and the servant, instead of delivering them to his *master, [126] to his own use, this is holden to be no larceny at common law. 2 East, P. C. 568. Therefore, if a shopman receive money from a customer of his master, and instead of putting it into the till, secrete it ; R. *v.* Bull, 2 Leach, 841 cit.; or, if a banker's clerk receive money at the counter,

and instead of putting it into the proper drawer, purloin it, R. *v.* Bazely, 2 Leach, 835, or receive a bond for the purpose of being deposited in the bank, and instead of depositing it, convert it to his own use: R. *v.* Waite, 1 Leach, 28, 2 East, P. C. 570: in these cases, it has been holden, that the clerk or shop man is not guilty of larceny. There is a distinction between servants and bailees, which it may be necessary to mention in this place: if, for instance, a weaver or silk throwster, deliver yarn or silk to be wrought by his journeymen in his house, and they carry it away and convert it to their own use, this is larceny: but if to be wrought out of the house, it is not; for the journeymen in that case are considered bailees, not servants. See 2 East, P. C. 682, 683.

If the owner of goods deliver them to another, but be present all the time they are in the other's possession, and there be no intention upon the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery; and if the person to whom he has so delivered them, make away with them and convert them to his own use, he will be guilty of larceny. 2 East, P. C. 683, 684. 1 Hawk. c. 33. s. 2. As, for instance, if the owner give the goods to a man to carry, and accompany him at the same time,—if the man run away with the goods, he is clearly guilty of larceny.

So, if a man have a bare use of the goods of another, this does not divest the owner of the possession in law; and if the person, who thus hath the use of them, fraudulently convert them, it is larceny. As, for instance, if a guest rob his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use. 1 Hale, 506. 1 Hawk. c. 33. s. 6.

It may be necessary to add, that although the taking must in strictness be *invito domino;* yet, where a servant, being solicited to become an accomplice in robbing his master's house, informed his master of it; and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come: it was holden, that this conduct of the master was no defence to an indictment against the robbers. R. *v.* Egginton, 2 B. & P. 508.

[127] *Where a larceny is committed in one county, and the thief carries the goods into another county; in contemplation of law, he is guilty of, not only a carrying away, but also of a taking, in every county through, or into which, the goods have been carried by him. 1 Hale, 507. 1 Hawk. 33. s. 52. 3 Inst. 113. and see ante, p. 5.

Carry away.] There must not only be a taking, but also a carrying away, in order to constitute larceny. A bare removal, however, from the place in which the thief found the goods, though he does not make off with them, is a sufficient asportation or carrying away. 4 Bl. Com. 231. As, for instance, if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, have removed them from his chamber down stairs; 3 Inst. 108, 109; or if a thief, intending to steal plate, take it out of a chest in which it was, and lay it down upon the floor, but be surprised before he can make his escape with it; R. *v.* Simpson, Kel. 31. 1 Hawk. c. 33. s. 25: or if, intending to steal a cask of wine, he remove it from the head to the tail of the wagon in which it is placed, and be detected before he can effect his purpose of carrying it off: R. *v.* Coslet, 1 Leach, 256: these have been holden to be sufficient asportations to constitute larceny. But

where the defendant merely set a package on end, in the place where it lay, for the purpose of cutting open the side of it, to get out the contents, and was detected before he had accomplished his purpose: the judges held that this was not sufficient. R. *v.* Cherry, 2 East, P. C. 556. So, where the thief was not able to carry off the goods, on account of their being attached by a string to the counter; Anon. 2 East, P. C. 556; or to carry off a purse, on account of some keys attached to the strings of it getting entangled in the owner's pocket: R. *v.* Wilkinson, 1 Hale, 508: the court in these cases held, that there was not a sufficient carrying away to constitute larceny; to render the asportation in such cases complete, there must be a severance. 2 Russel, 1034, 1035.

Indictment for Horse Stealing.

Commencement, as ante, p. 113.] One mare, of the price of ten pounds, of the goods and chattels of one J. N., then and there being found, then and there feloniously did steal, take, and lead away; against the peace of our lord the King, his crown and dignity.

Stealing a "horse, gelding, or mare," is felony, death. 1 Ed. 6. c. 12. s. 10. 2 & 3 Ed. 6. c. 33.

**Evidence.* [128]

Prove a larceny of the mare, as directed ante, p. 114—127. As the statutes mention *horse*, *gelding*, and *mare*, proof that the defendant stole a mare, will not support an indictment for stealing a horse; and *è converso*: See R. *v.* Cooke, ante, p. 23, 63: at least, it should seem that such evidence would not be sufficient, under the statutes, to oust the defendant of clergy; although perhaps it would be deemed sufficient to convict him as for a larceny at common law, "horse" being a generic term. *Sed. qu.*

Indictment for Stealing Sheep or other Cattle.

Commencement, as ante, p. 113.] Five sheep [or "bulls, cows, oxen, steers, bullocks, heifers, calves, lambs") of the price of four pounds, of the goods and chattels of J. N., then and there being found, then and there feloniously did steal, take, and drive away; against the peace of our lord the King, his crown and dignity.

Stealing sheep or other cattle, is felony, death; 14 G. 2. c. 6. s. 1; *and this statute is to be deemed and taken to extend to any bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever.* 15 G. 2. c. 34.

Evidence.

Prove a larceny of the sheep, as directed, ante, p. 114—127. Where the defendant removed the sheep from the fold into the open field, killed them, and took away the skins merely: the judges held, that removing the sheep from the fold, was a sufficient driving away, to constitute the offence within the meaning of the above statutes. R. *v.* Rawlins, M. 1800, 2 East, P. C. 617. See the next precedent.

Proof that the defendant stole a heifer, has been holden not to be sufficient to support an indictment for stealing a cow; for both are mention-

ed in the statute. R. v. Cook, ante, p. 23, 63. *Quære* at common law. *Vide supra.*

Indictment for Killing Sheep or Cattle, with intent to steal part of the carcass.

Commencement, as ante, p. 113.] Five sheep, ("bulls, cows, oxen, steers, bullocks, heifers, calves, lambs") of the price of four pounds, of the goods and chattels of J. N., then and there being found, then
[129] and there wilfully and feloniously did *kill, with a felonious intent to steal part of the carcasses, that is to say [*the inward fat*], of the said sheep: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Killing a sheep, &c., with intent to steal the whole or any part of the carcass, is felony, death. 14 G. 2. c. 6. s. 1. 15 G. 2. c. 34. *See the last precedent.*

Evidence.

To support this indictment, you must prove two things:

1. That the defendant killed the sheep: and this is proved either positively, as by a witness who saw him do it; or by circumstantial evidence; as, for instance, that the skins were found in his possession, or were sold by him to another person, or the like. See ante, p. 77, 78.

2. That he killed them, with the intent stated in the indictment. The best proof of this is, that the part of the carcass mentioned was actually stolen. But if the defendant were caught in the fact, that is, after killing the sheep, but before he had actually cut them up, then it is for the jury to say, upon a consideration of the facts of the case, whether he did not intend to steal the carcasses.

Proof that he killed a heifer, will not support an indictment charging him with having killed a cow. See R. v. Cooke, ante, p. 23, 63.

Indictment for Stealing Trees.

Commencement, as ante, p. 113.] About the hour of eleven in the night time of the same day, with force and arms, one oak tree of the value of five pounds, one beech ["ash, elm, fir, chestnut, asp"] tree of the value of three pounds, the property of J. N, then and there being found, then and there, without the consent of the said J. N., feloniously did steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, transportation for seven years; 6 G. 3. c. 36; *and the same, as to stealing roots, shrubs, or plants, to the value of* 5*s., in the night time. See the statute.*

Evidence.

Prove it, as you would a larceny at common law; see ante, p. 114—127; and prove the trees to have been taken without the consent of J. N. A variance in the species of tree, between the indictment and evidence, will be fatal.

[130] As to the time of night at which the offence must be proved *to have been committed, the same rule prevails as in burglary. R. v. Kemp. 1 Leach, 222.

Indictment for Stealing Lead affixed to buildings, &c.

Commencement, as ante, p. 113.] Sixty pounds weight of lead, of the value of six shillings, the property of J. N., then and there being fixed to the dwelling house of the said J. N., then and there feloniously did rip, steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, transportation for seven years. 4 G. 2. c. 32. *This statute extends also to "iron bar, iron gate, iron palisadoe, and iron rail," as well as to lead; and to lead, &c. fixed to any buildings or fixed in a garden, court yard, fence, or outlet thereto belonging.* See 21 G. 3. c. 68, *as to copper, brass, and bell metal, so fixed.*

Evidence.

Prove the offence, as a larceny at common law. See ante, p. 114—127. Prove also that the house, &c. from which the lead was stolen, was at the time the dwelling house, &c. of J. N. Any material variance in the description of the house, &c. between the indictment and evidence, will be fatal. Where a man (having given a false representation of himself) got into possession of a house, under a treaty for a lease of it, and then stripped it of the lead;—the jury being of opinion that he obtained possession of the house with intent to steal the lead, found him guilty, and he afterwards had judgment. R. *v.* Munday, 2 Leach, 850. In R. *v.* Senior, (1 Leach, 496,) it was holden that a "window casement made of iron, lead, and glass," was not within the statute. See also R. *v.* Hedge, 1 Leach, 201.

Indictment for Stealing Bills of Exchange, &c.

Commencement, as ante, p. 113.] One bill of exchange [promissory note, bank note, &c.] for the payment of ten pounds, and of the value of ten pounds, the property of J. N., then and there being found, feloniously did steal, take, and carry away; the said sum of ten pounds, secured and payable by and upon the said bill of exchange, being then and there due and unsatisfied to the said J. N.: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, with or without clergy, in the same manner as if the defendant had stolen goods or chattels of the same value, and *under [131] *the same circumstances.* 2 G. 2. c. 25. s. 3. *The statute extends to exchequer orders and tallies, and other orders, entitling a person to an annuity or share of any parliamentary funds; to exchequer bills;* (see 2 Leach, 954;) *bank notes; South Sea bonds; East India bonds; dividend warrants of the bank, South Sea company, or any other company, society, or corporation; bills of exchange; navy bills or debentures; goldsmiths' notes for payment of money; and other bonds, warrants, bills, and promissory notes for the payment of money.*

Evidence.

Prove a larceny of the bill, in the manner directed, ante, p. 114—127. It is immaterial whether the bill, at the time it was stolen, were indorsed by the payee, so as to be in a negotiable state, or not. Anon. 2 East,

P. C. 598. Country bank notes, paid by the agent in town, were stolen while on the way from the country bankers, for the purpose of being re-issued; and these were holden by the judges to be promissory notes, within the meaning of the statute. R. *v.* Clarke, 2 Leach, 1036, but see R. *v.* Phipoe, 2 Leach, 673, 2 East, P. C. 599.

Indictment for Stealing a Letter.

Commencement, as ante, p. 113.] Feloniously did steal, take, and carry away one letter from and out of a certain bag of letters then and there sent by the post, to wit, by the post from Droitwich, in the county of Worcester, to the city of Worcester: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (2d *count.*) And the jurors aforesaid upon their oath aforesaid do further present that the said J. S., afterwards, to wit on the day and year aforesaid, at the parish of A. in the county of B., feloniously did steal, take, and carry away one packet (the said packet being then and there, a letter containing [*divers bills of exchange*]) from and out of a certain other bag of letters, then and there sent by the post, to wit, by the post from Droitwich aforesaid, in the said county of Worcester, to the city of Worcester aforesaid: against the form, &c. (3d *count.*) "carry away one packet from and out of a certain other bag of letters, then and there sent by the post, to wit, by the post from Droitwich aforesaid in the said county of Worcester, to the city of Worcester aforesaid: against the form," &c.

Felony, death. 7 G. 3. c. 50. s. 2. 52 G. 3. c. 143. s. 3. *The*
[132] *venue may be laid either in the county where the offence was *committed, or in that in which the offender was apprehended.* 42 G. 3. c. 81. s. 3.

Evidence.

Prove a larceny of the letter, as directed, ante, p. 114—127. Where the defendant obtained the mail bags from the post office, pretending that he was the mail guard, and then ran away with them;—the jury, being of opinion that he got possession of them with intent to steal them, found him guilty; and the judges afterwards held the conviction to be right. R. *v.* Pearce, 2 East, P. C. 603. Taking the mail bags off the horse, during the momentary absence of the person employed to carry them, was holden to be a taking from his possession, within the meaning of stat. 52 G. 3. c. 143. s. 2. R. *v.* Robinson, 2 Stark. 485. Persons in the employment of the post office, and to whose care the letters are entrusted, are not within the meaning of these statutes; R. *v.* Scutt, 1 Leach, 106. 2 Id. 904. R. *v.* Pooley, 2 Leach, 904; embezzlement by them, is provided against by other statutes. *See the next section.*

Indictment for Stealing Deer.

Commencement, as ante, p. 113.] In a certain inclosed park belonging to J. N., wherein deer had been and then were usually kept, one fallow deer of the price of forty shillings, the property of the said J. N. then and there (to wit, in the said park) being found then and there wilfully and feloniously, without the consent of the said J. N., and without being otherwise authorized, did kill, steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, transportation for 7 *years.* 42 G. 3. c. 107. s. 1. *The statute*

also extends to hunting, snaring, and wounding deer, and to shooting at or otherwise attempting to kill them.

Evidence.

Prove the taking, &c., as you would sheepstealing; see ante, p. 128. Prove that the park was, at the time of the felony, inclosed, and that deer were usually kept in it; and prove the park to belong to J. N. Prove that the deer taken was the property of J. N. And lastly, you must prove that the deer was taken without the consent of J. N.; R. *v.* Rogers, 2 Camp. 654. ante, p. 66.; and J. N. himself will be a competent witness for this purpose.

**Indictment for being in a deer park, armed and disguised.* [133]

Commencement, as ante, p. 113] Being armed with a sword and with other offensive weapons, and having his face blacked [*or* " being disguised, that is to day, being—*here describe the disguise*] into and in a certain park, there situate, belonging to J. N., inclosed with pales [*or* a wall *or* fence] wherein deer had been, and then were, usually kept, unlawfully and feloniously did enter and appear: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death, 9 G. 1. c. 22. s. 1. *The venue may be laid in any county, at the option of the prosecutor. Ante, p.* 3.

Evidence.

Prove that the defendant was in the park, armed and disguised in the manner stated in the indictment; prove the park to belong to J. N.; prove it to be inclosed with pales, &c. as alleged in the indictment; and prove it to be a place where deer were usually kept.

Indictment for Stealing Conies.

Commencement, as ante, p. 113.] About the hour of eleven in the night of the same day, into a certain warren called ——— there situate (and which said warren was then lawfully used and kept for the breeding and keeping of conies, and then in the occupation of J. N.) wilfully and wrongfully did enter, and then and there, in the night time as aforesaid, wilfully and wrongfully did take 20 conies, of the price of five shillings, against the will of the said J. N., so being then and there occupier of the said warren as aforesaid: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *Add a similar count for killing conies, if it seem necessary.*

Seven years transportation, or a less punishment by whipping, fine, or imprisonment, at the discretion of the court. 5 G. c. 14. s. 6.

Evidence.

Prove a taking or killing; prove it to have been in the night time, as in the case of burglary; prove that J. N. was occupier of the warren, at the time the offence was committed, and that the warren was then used for the breeding and keeping of conies. It is immaterial whether the warren was inclosed or not,

*Where the defendant set wires in a warren, and a coney was caught in one of them, and the defendant was detected just as he was laying hold of the wire, the coney being then alive: *Bayley, J.* held this to be a *taking*, within the meaning of the statute. R. *v.* Glover, 2 Russel, 1195.

Indictment for being in a warren, &c. armed and disguised.

Same as the last precedent but one; excepting] Into and in a certain warren there situate, belonging to J. N., wherein conies had been and then were usually kept, [*or* "into and in a certain preserve and place there situate, belonging to J. N., wherein hares had been and then were usually kept,"] unlawfully and feloniously did enter and appear: against the form, &c.

Felony, death. 9 G. 1. c. 22. s. 1. *And the same if he rob the warren or preserve, being so armed and disguised.* Id.

Evidence.

Prove that the defendant was in the warren, &c., armed and disguised in the manner stated in the indictment; prove the warren, &c. to belong to J. N.; and prove it to be a place where conies or hares, respectively, are usually kept.

Indictment for Stealing Fish.

Commencement, as ante, p. 113.] Into a certain garden, adjoining and belonging to the dwelling house of J. N., there situate, unlawfully did enter, and in which said garden there then was a certain pond of water; and the said J. S. then and there, to wit, on the day and year aforesaid, in the garden aforesaid, thirty fish called carp, of the price of five shillings, thirty fish called tench, of the price of five shillings, and thirty fish called perch, of the price of five shillings, then and there bred, kept, and preserved in the said pond of water, unlawfully did steal, take, and carry away, without the consent of the said J. N., the owner of the said pond and fish: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Add a count for killing and destroying the fish, if it seem necessary. Where the indictment alleged the fish to be the goods and chattels *of the prosecutor, the judges held that these words might be rejected as surplusage.* R. *v.* Hundsdon, 2 East, P. C. 611.

Seven years transportation. 5 G. 3. c. 14. s. 1. *The statute extends to fish in any river, stream, pond, &c., in any inclosed park or paddock, or in any garden, orchard, or yard, adjoining or belonging to a dwelling house. Being armed and disguised, *and stealing fish out of any river or pond, is felony, death.* 9 G. 1. c. 22. s. 1. *So is breaking down the head or mound of a fish pond, whereby the fish may be lost or destroyed.* Id. *When fish are taken out of a trunk, net, or the like, the defendant may be indicted as for a larceny at common law.* See ante, p. 113.

[135]

Evidence.

Prove a larceny of the fish; prove the pond from which they were taken, to be in a garden adjoining or belonging to the dwelling house of J. N., as laid in the indictment; and prove that they were taken without

the consent of the owner. See R. *v.* Rogers, ante, p. 66. Where the defendant had taken fish in a river that ran through an inclosed park, but it appeared that no means had been taken to keep the fish within that part of the river that ran through the park, but that they could pass down or up the river, beyond the limits of the park, at their pleasure; the judges held that this was not a case within the statute, as the fish could not be said to be *bred, kept, or preserved*, in that part of the river that was within the park. R. *v.* Carradice et al. 2 Russel, 1199.

The offence must be proved to have been committed within six calendar months before the finding of the indictment. 5 G. 3. c. 14. s. 1.

Indictment for Stealing from the Dwelling House.

Commencement as ante, p. 113.] One silver sugar basin of the value of three pounds, six silver table spoons of the value of three pounds, and twelve silver tea spoons of the value of two pounds, of the goods and chattels of one J. G., in the dwelling house of one J. N., then and there being found then and there in the said dwelling house, feloniously did steal, take, and carry away: against the peace of our lord the King, his crown and dignity.

Stealing to the value of forty shillings in a dwelling house or out house thereunto belonging, whether the owner, &c. be within or not, is felony, death. 12 A. st. 1. c. 7. s. 1.

Evidence.

Prove a larceny, as directed ante, p. 114—127; prove it to have been committed in the dwelling house of J. N.; and prove the goods stolen to be of the value of forty shillings.

If you fail to prove the larceny, the defendant of course must be acquitted altogether. If you fail to prove it to have been committed in a dwelling house (such as burglary might be committed in, 2 East, P. C. 644, and see post) or *fail to prove that it was the dwelling [136] house of J. N., R. *v.* White, 1 Leach, 252, and see ante, p. 11, or fail to prove the goods (stolen at any one time, R. *v.* Petrie, 1 Leach, 294) to be of the value of forty shillings, the defendant must be acquitted of the capital offence, and found guilty of the simple larceny only.

If a man steal the goods of another in his own house, R. *v.* Thompson & al. 1 Leach, 338, or a woman steal the goods of a stranger in the house of her husband, R. *v.* Gould, 1 Leach, 217, it is not within the statute. So, if the goods be under the protection of the *person* of the prosecutor, at the time they are stolen, the case will not be within the statute. As, for instance, where the defendant procured money to be delivered to him for a particular purpose, and then ran away with it, R. *v.* Campbell, 2 Leach, 564, ante, p. 122, and where the prosecutor, by the trick of ring-dropping, was induced to lay down his money upon a table, and the defendant took it up and carried it away, R. *v.* Owen, 2 Leach. 572, 2 East, P. C. 645, these cases were holden not to be within the statute. For a case to be within the meaning of the statute, it is necessary that the goods should be under the protection of the house, and be deposited in it for safe custody.

Indictment on Stat. W. & M. c. 9. s. 1. for Stealing in the Dwelling House.

The same as in the last precedent, to the words "carry away" inclusive; then add:] One J. L. and M. his wife then, to wit, at the time of the

committing of the felony aforesaid, being in the said dwelling house, and therein by the said J. S., then being put in bodily fear: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 3 W. & M. c. 9. s. 1.

Evidence.

Prove a larceny in the dwelling house, as above directed; and prove that the person mentioned in the indictment was thereby put in bodily fear, in the dwelling house.

Indictment for privately Stealing in a Shop or Warehouse.

Commencement, as ante, p. 113.] Twenty yards of muslin of the value of twenty shillings, and ten yards of linen of the value of fifteen shillings, of the goods and chattels, wares and merchandises, of J. N., in the shop, [warehouse, coach-house, or stable,] of him the said J. N., then and there being found, then and there privately and feloniously did steal,
[137] take, and *carry away: against the peace of our lord the King, his crown and dignity.

* *If the goods be of the value of* 5*l. and under* 15*l. transportation for life, or for not less than seven years, or imprisonment in the house of correction for not more than seven years;* 1 G. 4. c. 117; *if of the value of* 15*l.* or *upwards, felony, death.* 10 & 11 W. 3. c. 23.

Evidence.

Twenty yards of muslin, &c.] Prove this, as directed, ante, p. 114. If the larceny be committed in a shop or warehouse, the goods must be such as were exposed, or intended to be exposed for a sale there. And therefore where the defendant stole a watch from a watchmaker's window, which had been merely to be repaired, it was holden not to be within the statute. R. *v.* Stone, 1 Leach, 334. So, where a shirt, left in a shop, to be sent to a sempstress to mend, was stolen therefrom, it was holden not to be an offence within the statute. Anon. 2 East, P. C. 642. So, money has been holden not to be within the act. Fost. 79. And the goods must be the property of the owner of the shop or warehouse, 2 East, P. C. 642, or, at least, left with him for sale.

If the larceny be in a coach-house or stable, it must be of such things as are kept there, such as carriages, harness, saddles, bridles, horse furniture, &c. Where the prosecutor's coachman left his box coat in the stable, and it was stolen, it was holden not to be within the statute. R. *v.* Seas, 1 Leach, 304, 2 East, P. C. 643.

If the goods appear not to be such as are within the statute, the defendant can be convicted of the simple larceny only.

Of the value of, &c.] If the jury find the defendant guilty, but find the goods to be under the value of 5*s.*, the defendant shall have judgment for the simple larceny; if of the value of 5*s.*, or upwards, and under 15*l.*, he shall have judgment of transportation or imprisonment, as above mentioned; if of the value of 15*l.* or upwards, he shall have judgment of death. *Vide supra.*

In the shop, &c.] Where it was proved that the defendant waited outside the shop, and received the goods as soon as they were stolen by another, the court held that he was not guilty of an offence within this statute.

R. *v.* Wild, 1 Leach, 17 n. A warehouse, to be within the meaning of the act, must be such as factors or traders keep their goods for sale in, and where customers go to view them; and not warehouses where goods are put for safe keeping merely; R. *v.* Howard, Fost. *77, 78; and it was doubted if it extended to the warehouse of [138] a Blackwell Hall factor, where the pieces were never taken out of the papers in which they were wrapped, and sometimes not even out of the bales in which they were packed. R. *v.* Godfrey, 1 Leach, 287.

If the larceny be not proved to have been committed in a shop, &c. within the meaning of the act, the defendant can be convicted of the simple larceny merely.

Privately.] If the defendant be perceived committing the larceny, by any person in the employment of the prosecutor, and in the shop, &c. at the time, the case is not within the act. R. *v.* Armstrong, 2 Russel, 1168. Also if it appear that force was used, the case is not within the statute; Fost. 79; even where the door of the shop was opened, seemingly with a picklock, without violence, but a desk in the counting-house wrenched open and the lock broken, the judges held that the case was not within the statute, because force had been used. R. *v.* Jones, 2 East, P. C. 641.

Did steal, take, &c.] In all other respects, this part of the indictment is proved in the manner directed, ante, p. 114—127. You must of course prove an actual, and not merely a constructive taking.

Indictment for House Breaking.

Commencement as ante, p. 113.] About the hour of eleven in the forenoon of the same day, with force and arms, the dwelling house of J. N., there situate, feloniously did break and enter (no person in the said dwelling house then and there being,) and two pewter dishes of the value of five shillings, one dressing case of the value of two pounds, and six chairs of the value of thirty shillings, of the goods and chattels of the said J. N., in the said dwelling house then and there being found, then and there feloniously did steal, take, and carry away: against the peace of our lord the King, his crown and dignity.

Felony, death. 39 El. c. 15. s. 2. *This statute expressly extends to outhouses belonging to a dwelling house: it is extended to shops and warehouses belonging to a dwelling house, by stat.* 3 W & M. c. 9. s. 1. *This latter statute makes robbing a dwelling house in the day time, any person being therein, felony, death. The indictment for this latter offence may be the same as the above precedent, substituting for the words "no person" the words "the said J. N." or "one J. G." And upon this indictment you will not be obliged to prove the goods to be of the value of 5s. or any other particular sum.*

**Evidence.* [139]

About the hour of eleven, &c.] It is not necessary that the offence should be proved to have been committed at this hour precisely; if proved to have been committed at any hour in the day time, (that is, at any hour when a man's features may be discerned by day light, see 3 Inst. 63,) it will be sufficient.

The dwelling houses of J. N.] This must be proved in the same manner as in burglary. *Vide post.* The statute, however, extends expressly to outhouses "belonging and used to and with" a dwelling house.

Did break and enter.] This must be proved in the same manner as in burglary. 1 Hale, 526. Fost. 108. *Vide post.*

No person in the said dwelling house, &c.] This must be proved as laid. 1 Hawk. c. 3. s. 8, 9. But where a servant, being alone in the house,

let in thieves who robbed it, this was holden to be within the statute, notwithstanding the servant's being in the house at the same time. R. *v.* Smith, 2 Leach, 568 n.

There must be an actual, and not merely a constructive taking; but, in all other respects, the larceny may be proved in the manner directed, ante, p. 114—127. The goods must be proved to be of the value of 5*s*.

If the prosecutor succeed in proving the larceny, and fail in proving the goods to be of the value of 5*s*., or fail in proving any other of the circumstances above mentioned, the defendant shall be convicted of the simple larceny merely.

Indictment for Stealing from Lodgings.

Commencement, as ante, p. 113.] One sheet of the value of five shillings, two window curtains of the value of twenty shillings, and one bed of the value of two pounds, of the goods and chattels of one J. N. the said goods and chattels being then and there in a certain lodging room in the dwelling house of the said J. N., there situate, let by contract by the said J. N. to the said J. S., and to be used by the said J. S. in and with the lodging aforesaid, then and there being found, feloniously did steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Adjudged larceny and felony, by stat. 3 & 4 W. & M. c. 9. s. 5.

[140] **Evidence.*

You must prove that a certain room or rooms in the dwelling house of J. N. as described in the indictment, were let by J. N. to the defendant; that the goods in question were also let, to be used with the lodging. You then prove that the defendant took and carried away the goods, as in the case of larceny (except that you prove an actual, and not merely a constructive taking,) and lastly, prove the goods to be the property of J. N.

It has been said, that merely pawning the goods, is not sufficient proof of an "intent to steal, embezzle, or purloin," (which are the words in the statute,) because such pawning is provided for by another statute, which inflicts only a pecuniary penalty; R. *v.* Patum, 1 Hawk. c. 43. s. 10; but this may be doubted; and in most of the cases upon this statute, which have come under my observation, pawning the goods was the species of conversion proved.

It may be necessary to observe, that where the whole house is let to a man, he cannot be indicted under this statute. R. *v.* Brown, 1 Hawk. c. 43. s. 3. R. *v.* Palmer, 2 Leach, 680.

As to the contract, it must be proved in substance and legal effect, as laid in the indictment. Where the indictment stated the apartments to have been let to one, and the evidence was of a letting to two, the defendant was acquitted. R. *v.* Bill, 1 Hawk. c. 43. s. 7. Where a man went to take a lodging for himself and a woman who lived with him, but the lodging was afterwards actually taken by the woman, evidence of this was holden not to support an indictment alleging that the lodging was let to the man. R. *v.* Goddard et al. 2 Leach, 545. But if the lodging be let to a wife, and the husband cohabit with her, and use the lodgings, this will be good evidence to support an allegation, that the lodging was let to the husband. See R. *v.* Pike, 1 Hawk. 43. s. 4. If it appear, that

the contract was at an end, at the time the goods were taken away, it seems the defendant must be acquitted. R. *v.* Butler, 1 Hawk. c. 43. s. 8.

Indictment for Sacrilege.

Commencement, as ante, p. 113.] One silver cup of the value of six pounds, of the goods and chattels of the parishioners of the said parish, in the church of the parish aforesaid, then and there being found, then and there feloniously and sacrilegiously did steal, take, and carry away: against the peace of our lord the King, his crown and dignity. *The precedents in general conclude, "against the form of the statute," &c.: but I cannot pereeive upon what principle; for sacrilege was a felony at common law.* See ante, p. 28.

**Felony, death.* 23 *H.* 8. *c.* 1. *s.* 3. 1 *Ed.* 6. *c.* 12. *s.* 10. [141] *These statutes extend to parish churches, and other churches and chapels.*

Evidence.

Prove the larceny, as directed, ante, p. 114—127, except that you must prove an actual, and not merely a constructive taking. Prove it to have been committed in the church or chapel described in the indictment. And prove the goods to be of the value of 12*d.*

Indictment for Stealing from a Vessel on a navigable river.

Commencement as ante, p. 113.] Twenty pounds weight of indigo, of the value of fifty shillings, of the goods and chattles, wares and merchandise, of J. N., then and there being in a certain ship called the Ratler, upon the navigable river Thames, and then and there found, then and there in the said ship feloniously did steal, take, and carry away: against the peace of our said lord the King, his crown and dignity.

Felony, death. 24 *G.* 2. *c.* 45. *The statute extends to "ship, barge, lighter, boat, or other vessel or craft," in any port or navigable river, or in any creek belonging thereto. The same statute makes it felony, death, to steal goods, &c. to the value of forty shillings, from a wharf or quay adjacent to such port or navigable river.*

Evidence.

Prove a larceny, as directed, ante, p. 114—127, except that you must prove an actual, and not merely a constructive taking. The goods, it seems, must be such as are usually lodged in such vessels; and therefore it has been holden that stealing foreign money, current here, although not made so by proclamation, was not an offence within this act. R. *v.* Grimes, Fost. 79 n.

Prove the larceny to have been committed in the ship, &c., and upon the river, &c., mentioned in the indictment. Where it was laid to be committed in a barge on the river Thames, and proved to have been committed in a barge lying aground on the banks of one of the creeks of the river, namely, Limehouse dock, it was holden to be a fatal variance. R. *v.* Pike, 1 Leach, 417.

Indictment for Stealing Linen from bleaching grounds.

Commencement as ante, p. 113.] Thirty yards of linen cloth, [142] of the value of thirty shillings, of the goods and chattles of *J. N., (there being laid, placed, and exposed to be bleached and whitened, in a certain bleaching field of the said J. N. there situate, and then and there made use of by the said J. N., for the bleaching and whitening of the said linen cloths, the said J. N. being then and there a bleacher), then and there being found, then and there in the said bleaching field, feloniously did steal, take, and carry away: against the peace of our lord the King, his crown and dignity. The precedents in general conclude, against the form of the statute, &c.: but I cannot perceive upon what principle; this being a larceny at common law. See ante, p. 28.

Transportation for life, or for not less than seven years, or imprisonment and hard labour for not more than seven years. 51 *G.* 3. *c.* 41. *The statute extends not only to linen, but also to cotton goods, yarn, lace, &c laid on bleaching grounds, or in drying houses &c., to be bleached, printed, dried, &c., by any bleacher, calico printer, &c.*

Evidence.

Prove that the linen, &c. was laid on the bleaching field, &c. of J. N. for the purpose of bleaching, &c., and that J. N. carries on the business of a bleacher, &c. as stated in the indictment. Upon an indictment for stealing yarn from a bleaching ground, it appearing in evidence that the yarn, at the time it was stolen, was in heaps, for the purpose of being carried into the house, and not spread out for bleaching, Thompson, B. held, that the case was not within the statute. R. *v.* Hugill, 2 Russell, 1293.

Prove the larceny as in ordinary cases, except that an actual, and not merely a constructive taking, must be proved. The goods must be proved to be of the value of ten shillings. 51 G. 3. 41.

If you prove the larceny, but fail to prove the other circumstances so as to bring the case within the statute, the defendant must be found guilty of the simple larceny merely.

Indictment for Stealing Cloth from the Tenters.

Commencement as ante, p. 113.] About the hour of eleven in the night of the same day, thirty yards of woollen cloth, called ——, of the value of ten pounds, of the goods and chattles of J. N., then and there being found, from the tenters [or rack] of him the said J. N., on which the said cloth then and there was for the purpose of drying, then and there feloniously did cut, steal, take, and carry away against the peace [143] of our lord the King, his crown *and dignity. The precedents usually conclude, against the form of the statute; but I do not perceive upon what principle; this being a felony at common law. See ante, p. 28.

Felony, transportation for seven years. 22 C. 2. c. 5. s. 3. *This statute extends to all woollen manufactures.*

Evidence.

Prove that the cloth in question was on the tenters; prove the larceny, as in ordinary cases, see ante, p. 114— 127, except that an actual, and not merely a constructive taking, must be proved; and prove it to have been committed in the night time, as in burglary. *Vide post.* If you

prove the larceny, but fail in proving any of the circumstances necessary to bring the case within the statute, the defendant must be found guilty of the simple larceny merely.

Indictment for Stealing from the Person.

Commencement, as ante, p. 113.] One watch of the value of five pounds, one pocket book of the value of two shillings, and one pocket handkerchief of the value of one shilling, of the goods and chattels of J. N., from the person of the said J. N., then and there feloniously did steal, take, and carry away: against the peace of our said lord the King, his crown and dignity.

Felony, transportation for life or for not less than seven years; or imprisonment and hard labour, or imprisonment only, for not more than three years. 48 G. 3. c. 129. s. 2.

Evidence.

Prove a larceny, as directed ante, p. 114—127, except that an actual, and not merely a constructive taking, must be proved; and prove the goods to have been taken from the person of J. N. It is immaterial whether the larceny were effected privately or with force, provided the force were not of such a nature as to constitute a robbery at common law. 48 G. 3. c. 129. s. 2. Where it was proved that the defendant and three others hustled the prosecutor, and one of the others took from him his pocket book and other things, and the defendant was thereupon convicted: the judges held the conviction to be right; being of opinion, that the force used was not sufficient to constitute a robbery. R. *v.* Pearce, 2 Leach, 1046.

Indictment for Robbery.

Commencement, as ante, p. 113.] With force and arms, in and upon one J. S., in the peace of God and of our lord the King *then [144] and there being, feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then and there feloniously did put, and one gold watch of the value of ten pounds, and ten sovereigns of the current coin of the realm in monies numbered, of the goods and chattels of the said J. N., from the person and against the will of the said J. N., then and there feloniously and violently did steal, take, and carry away: against the peace of our lord the King, his crown and dignity.

Felony, death, whether committed in or near the highway, 23 H. 8. c. 1. s. 3. 1 Ed. 6. c. 12. s. 10, *or not.* 3 W. & M. c. 9. s. 1.

Evidence.

To maintain this indictment, you must prove a larceny, and prove it to have been committed under the circumstances, which, together with it, constitute the offence of robbery; and which we shall now consider, under the following heads:

In bodily fear, &c.] The prosecutor must either prove that he was actually in bodily fear, from the defendant's actions, at the time of the robbery: or he must prove circumstances, from which the court and jury may presume such a degree of apprehension of danger, as would induce the prosecutor to part with his property; Fost. 128; and in this

latter case, if the circumstances thus proved be such as are calculated to create such a fear, the court will not pursue the inquiry further, and examine whether the fear actually existed. Therefore if a man knock another down, and steal from him his property whilst he is insensible on the ground: this is robbery. Fost. 128. A stage coach having frequently been robbed on a particular road, J. N. went in it for the purpose of apprehending the robber; the robber met the coach, presented a pistol, and demanded money of the passengers; J. N. accordingly delivered his money, but immediately afterwards jumped out of the coach, and with the assistance of others, secured the robber: and this was holden to be robbery. Fost. 129. Where the defendant tore a lady's ear through, in snatching an ear-ring from it: the judges held it to be robbery. R. *v.* Lapier, 1 Leach, 320. So, where the defendant tore some hair from a lady's head, in snatching a diamond pin from it, the pin having a corkscrew stalk, and being twisted very much in the lady's hair: this was holden to be robbery. R. *v.* Moore, 1 Leach, 385. So, if there be a struggle for the property, and it be wrested from the prosecutor by superior force, it will be robbery. R. *v* Davies, 2 East, P. C. 709. But merely snatching property from a person unawares, and running away with it, will not be robbery. R. *v.* Steward, 2 East, P. C. 702.

[145] *R. *v.* Horner, Id. 703. R. *v.* Baker, 1 Leach, 290. R. *v.* Macauley, Id. 287, because fear cannot in fact be presumed in such a case.

If a man take another's child, and threaten to destroy him, unless the other give him money; this is robbery. Per Eyre, C. J. in R. *v.* Reave, 2 East, P. C. 735, and see Id. 718. S. P. So, where the defendant, at the head of a mob, came to a prosecutor's house and demanded money, threatening to destroy the house unless the money were given; the prosecutor thereupon gave him 5*s.*, but he insisted on more, and the prosecutor, being terrified, gave him 5*s.* more; the defendant and the mob then took bread, cheese, and cider from the prosecutor's house, without his permission, and departed; this was holden to be a robbery. R. *v.* Simons, 2 East, 731. See R. *v.* Brown, Id. 731. S. P. So, where during some riots at Birmingham the defendant threatened the prosecutor that unless he would give him a certain sum of money, he should return with the mob and destroy his house; and the prosecutor, under the impression of this threat, gave him the money: this was holden by the judges to be robbery. R. *v.* Astley, 2 East, P. C. 729. Even where, in the riots of 1780, a mob headed by the defendant came to the prosecutor's house, and demanded half a crown, which the prosecutor from terror of the mob, gave: this was holden to be robbery, although no actual threats were uttered. R. *v.* Taplin, 2 East, P. C. 712.

So, obtaining money under a threat of charging the prosecutor with an unnatural crime, or with a solicitation to commit it, has in many cases been holden to be robbery, R. *v.* Jones, 1 Leach, 139, 2 East, P. C. 714. R. *v.* Donally, 1 Leach, 193, 2 East, P. C. 715, even where it appeared that the prosecutor parted with his money from a fear merely of the injury his character would receive from such an imputation. R. *v.* Hickman, 1 Leach, 278. But where a threat of this kind was made for the purpose of extorting money from the prosecutor, and the prosecutor some time afterwards gave the defendant the money demanded, not from any apprehension of injury to his character, but to have an opportunity of prosecuting the defendant for the offence: the judges held that it was not robbery: because there was no actual fear, nor any violence from which

they could imply or presume it. R. *v.* Reave, 2 Leach, 616, and see R. *v.* Jackson & al. 1 East, P. C. Addenda, xxi.

Where the prosecutrix was threatened by some persons, at a mock auction, to be sent to Bow-street and from thence to Newgate, unless she paid for some article they pretended was knocked down to her, although she never bid for it; and they accordingly called in a pretended constable, who told her that unless she gave him a shilling she must go with him; and she gave him a shilling accordingly, not from any apprehension of personal danger, but from a fear of being taken to prison: the *judges held that the circumstances of the case were not sufficient [146] to constitute the offence of robbery; it was nothing more than a simple duress. R. *v.* Knewland & al. 2 Leach, 721. 2 East, P. C. 732. But where the defendant, with an intent to take money from a prisoner who was under his charge for an assault, handcuffed her to another prisoner, kicked and beat her whilst thus handcuffed, put her into a hackney coach for the purpose of carrying her to prison, and then took 4*s.* from her pocket under pretence of paying the coach-hire; the jury finding that the defendant had previously the intent of getting from the prosecutrix whatever money she had, and that he used all this violence for the purpose of carrying his intent into execution, the judges held clearly that it was robbery. R. *v.* Gascoigne, 2 East, P. C. 709. Even in a case where it appeared that the defendant attempted to commit a rape upon the prosecutrix, and she gave him some money to desist, which he put in his pocket, and then continued his attempt until he was interrupted; this was holden by the judges to be robbery. R. *v.* Blackham, 2 East, P. C. 711.

And it is little matter under what pretence the robber obtains the money, &c., if the prosecutor be forced to deliver it, from actual fear, or under circumstances from which the court can presume it. As, for instance, if a man with a sword drawn ask alms of me, and I give it him through mistrust and apprehension of violence, it is as much a robbery as if he had demanded money in the ordinary way. 4 Bl. Com. 242. Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for want of a permit; after some altercation he went with the driver, under pretence of going before a magistrate, and during their absence the mob pillaged the cart: this was holden to be a robbery. 2 East, P. C. 709. So, where the defendant took goods from the prosecutrix of the value of 8*s.*, and by force and threats compelled her to take 1*s.* under pretence of payment for them, this was holden to be robbery. R. *v.* Simons, 2 East, P. C. 712. and see R. *v.* Spencer, Id. 712. S. P.

The fear must precede the taking. For if a man privately steal 6*d.* from the person of another, and afterwards keep it by putting him in fear: this is no robbery, for the fear is subsequent to the taking. 1 Hale, 534. 1 Hawk. c. 34. s. 7.

One gold watch, &c.] The goods taken must be such as may be the subject of larceny; see ante, p. 114; and they must be proved to be the absolute or special property of the person named in the indictment. See ante, p. 117. The value is immaterial. 1 Hale, 532. But they must be of some value to the party robbed; and therefore where the defendant compelled the prosecutor, by threats, to give her his promissory note for a sum of money, it was holden by the judges not to be *rob- [147] bery, because the note was of no value to the prosecutor. R. *v.* Phipoe, 2 Leach, 673.

From the person, &c.] The goods must be proved to have been taken,

either from the person of the prosecutor, or in his presence. See R. v. Francis, 2 Str. 1015. R. v. Grey, 2 East, P. C. 708. If a thief put a man in fear, and then in his presence drive away his cattle, it is robbery. 1 Hale, 533. So, if a man, being assaulted by a robber, throw his purse into a bush; or, flying from a robber, let fall his hat; and the robber in his presence take up the purse or hat and carry it away: this would be robbery. 1 Hale, 533.

Against the will.] It must appear in evidence that the goods were taken against the will of the party robbed; that is, that they were either taken from him by force and violence, or delivered up by him to the defendant under the impression of that degree of fear and apprehension which is necessary to constitute robbery. Therefore where the party robbed concerted and connived at the robbery, and got one of his confederates to procure two strangers to commit it, for the purpose of getting a reward upon the apprehension and conviction of the strangers: the judges held that it was not a robbery, because the property was not taken against the party's will. R. v. McDaniel & al. Fost. 121.

Feloniously.] The goods must appear to have been taken *animo furandi*, as in other cases of larceny. See ante, p. 119. And therefore if a man, by force or threats, compel another to give him goods he has to sell, and give him in return money to the amount of the value of the goods, it is doubted very much if this be robbery; 1 Hawk. P. C. c. 34. s. 14; although undoubtedly it would be, if the goods were of greater value than the money given for them. See ante, p. 146.

Violently.] It is not necessary to prove that the goods were taken by actual violence or force; proof that they were delivered to the defendant by the party robbed, under the impression of that degree of fear and apprehension necessary to constitute robbery, will be sufficient. See ante, p. 144—146.

Take and carry away.] An actual taking, either by force, or upon delivery, must be proved; that is, it must appear that the robber actually got *possession* of the goods. Therefore, if a robber cut a man's girdle in order to get his purse, and the purse thereby fall to the ground, and the robber run off or be apprehended before he can take it up: this would not be robbery, because the purse was never in the possession of the robber. 1 Hale, 533. But it is immaterial whether the taking
[148] *were by force or upon delivery; and if by delivery, it is also immaterial whether the robber have compelled the prosecutor to it, by a direct demand in the ordinary way, or upon any colourable pretence. See ante, p. 144—146.

A carrying away, must also be proved, as in other cases of larceny. See ante, p. 127. And therefore, where the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him; and the man accordingly laid down the bed, but the robber, before he could take it up so as to remove it from the place where it lay, was apprehended: the judges held that the robbery was not complete. R. v. Farrel, 1 Leach, 322 n. But where the defendant snatched at a lady's ear-ring, and succeeded in separating it from the ear, and it was afterwards found among the curls of her hair: the court held this a sufficient proof of asportation, to support the indictment. R. v. Lapier, 1 Leach, 320.

It may be necessary to add here, that if the property be once taken, the offence will not be purged by the robber delivering it back to the owner. 1 Hale, 533. 1 Hawk. c. 34. s. 2. R. v. Peat, 1 Leach, 228.

Indictment for an Attempt to Rob.

Commencement, as ante, p. 113.] With force and arms, to wit, with a certain offensive weapon, to wit, with a certain pistol which he the said J. S. in his right hand then and there had and held, in and upon one J. N., in the peace of God and our lord the King then and there being, unlawfully, maliciously, and feloniously did make an assault, with a felonious intent the monies of the said J. N. from the person and against the will of him the said J. N. then and there feloniously and violently to steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Or if no offensive weapon were used, then thus:] With force and arms, in and upon one J. N., in the peace of God and our lord the King then there being, unlawfully, maliciously, and feloniously did make an assault, and him the said J. N. then and there did menace, by threatening to [*here state the nature of the menaces,*] and then and there did feloniously demand of the said J. N., his the said J. N.'s money [*or goods, &c. according to the fact*] with a felonious intent the monies [*or goods, &c.*] of the said J. N., from the person and against the will of him the said J. N., then and there feloniously and violently to steal, take, and carry away: against the form, &c. *Where the indictment does not state an assault with an "offensive weapon or instrument," it must state a demand of "money, goods, *or* [149] *chattels."* R. *v.* Jackson et al. 1 Leach, 225, and see R. *v.* Remnant, 5 T. R. 169.

Felony, transportation for seven years. 7 G. 2. c. 21. s. 1.

Evidence.

To support this indictment, you must in fact prove a robbery, with the exception of the taking and carrying away.

If an assault with an offensive weapon be laid, it must be proved. But where the indictment charged an assault with a certain offensive weapon called a wooden staff, and the evidence was of a violent blow with a stone, the variance was holden to be immaterial, in the same manner as it would be in the case of murder. R. *v.* Sharwin, 1 East, P. C. 421. But where the assault was alleged to have been made upon J. N., and it was proved to have been made upon the driver of a post chaise in which he rode, the variance was holden to be fatal. R. v. Thomas, 1 Leach, 330. Where an assault with an offensive weapon is laid, it is unnecessary to prove a demand of money, &c. R. v. Trusty & al. 1 East, P. C. 418.

Where no assault with an offensive weapon is laid, a demand of money, &c. must be laid and proved. But it seems that it is not necessary to prove an express demand in words; if the gestures of the defendant, at the time, be plainly indicative of what he requires, and tantamount in fact to a demand, it should seem to be sufficient proof of the allegation of demand in the indictment. See R. v. Jackson & al. 1 Leach, 269. and see 1 East, P. C. 417. 1 Russel, 887.

The intent to rob, must of course be proved from circumstances. The jury are to judge of it, from what is stated in evidence of the acts of the defendant at the time he made the assault.

Indictment for Piracy at common law.

Admiralty of England: The jurors for our lord the King upon their oath present, that J. S. late of London, mariner, K. S. late of the same,

mariner, and L. T. late of the same, mariner, on the third of May in the year of our lord one thousand eight hundred and twenty-two, with force and arms, upon the high sea, within the jurisdiction of the Admiralty of England, to wit, in and on board of a certain ship called the Windsor Castle, in a certain place upon the high sea, distant about ten leagues from *Cutcheen* in the *East Indies* then being, in and upon certain mariners (to the jurors aforesaid unknown) in the peace of God and of our lord the King then and there being, piratically and feloniously did make an assault, and them the said mariners in bodily fear and danger of their lives
[150] on the high sea aforesaid then and there piratically and *feloniously did put, and the said ship called the Windsor Castle, and the apparel and tackle of the said ship, of the value of twelve hundred pounds, and seventy chests of opium of the value of fourteen hundred pounds, in and on board the said ship then being, of the goods and chattles of certain subjects of our said lord the King, to the jurors aforesaid unknown, and then and there in the custody and possession of the said mariners last aforesaid, with force and arms, from the care, custody, and possession, and against the will of the said mariners last aforesaid, then and there, to wit, on the day and year last aforesaid, upon the high sea aforesaid, in the place aforesaid, and within the jurisdiction aforesaid, piratically, feloniously, and violently did steal, take and carry away: against the peace of our lord the King, his crown and dignity.

Punished with death, and with the loss of lands and goods, in the same manner as upon an attainder for robbery upon land. 28 H. 8. c. 15. s. 3.

Evidence.

Prove a robbery; and prove it to have been committed upon the high sea, within the jurisdiction of the Admiralty. Attend also to the following particulars of evidence.

Upon the high sea.] The offence must be proved to have been committed within the jurisdiction of the court of Admiralty; that is, upon some part of the sea which is not *infra corpus comitatus.* See 13 R. 2. St. 1. c. 5. 15 R. 2. c. 3. All rivers in this country, until they flow past the furthest point of land next the sea, are within the jurisdiction of the courts of common law, and not of the court of admiralty. See 1 Ro. Rep. 175. 3 Inst. 113. 3 T. R. 315. Nor does the admiralty jurisdiction extend to any haven, creek, arm of the sea or other place, within the body of a county: 3 Inst. 113. 1 Hawk. c. 37. s. 11: thus where the sea flows in between two points of land in this country, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction of all offences committed within that line, the court of admiralty of all offences without it. But if a robbery be committed in creeks, harbours, ports, &c. in foreign countries, the court of admiralty indisputably have jurisdiction of it, and such offence is consequently piracy. R. *v.* Jemott, O. B. 28. Feb. 1812. MS. Of offences committed on the coasts, the admiralty have exclusive jurisdiction of offences committed beyond the low water mark; and between that and the high water mark, the court of admiralty have jurisdiction of offences done upon the water when
the tide is in, and the courts of common law of offences commit-
[151] ted upon the strand when the tide is out. *All the other parts of the high sea are indisputably within the jurisdiction of the admiralty.

In and on board, &c.] This must be proved as laid. If the name be unknown, it must be stated so in the indictment. See ante, p. 10, 11.

In the peace of our lord the King.] Some evidence must be given of this; for if the persons robbed be subjects of a state at enmity with this country, although it may perhaps be piracy, yet it is not cognizable as such in any court of admiralty within this realm. 4 Inst. 154. 2 R. 3. 2.

In bodily fear, &c.] This must be proved in the same manner as in robbery. 1 Sir L. Jenk. xciv.

And the said ship, &c.] The things stolen are proved in the same manner as in ordinary cases of larceny. The value is immaterial, as in robbery upon land. Molloy, 64. s. 18. It is said, that if one or more of the crew or passengers in a vessel be taken for the purpose of being sold for slaves, it is piracy. Id. 63. s. 16.

Of the goods and chattels of, &c.] These must be stated to be the goods of a subject or subjects of this realm, or of some state in amity with it; and the allegation must be proved as laid. *Vide supra.*

Piratically, feloniously, and violently.] The goods must be proved to have been taken *animo furandi*, as in other cases of larceny. Molloy, 71. s. 33. See ante, p. 119. And they must be proved to have been either taken with force and violence, or delivered to the pirates under the impression of that degree of fear and apprehension which is necessary to constitute robbery upon land. See ante, p. 144—146.

The taking, to be piracy, must be without authority from any prince or state. If a party making a caption at sea, do so by the authority of any prince or state, it cannot be considered piracy: for a nation never can be deemed pirates; fixed domain, public revenue, and a certain form of government, exempt a people from that character. Even a capture by authority of the states of Algiers, Tunis, or Tripoli, cannot be treated as piracy. 2 Sir L. Jenk. 790. Grot. 2. c. 18. s. 2. Also, at common law, if a subject of this realm committed acts of hostility against another subject, under the authority of a commission from a foreign prince, it was not piracy; 2 Sir L. Jenk. 754; but the law has since been altered in this respect, by 11 & 12 W. 3. c. 7. and 18 G. 2. c. 30. s. 1.

If the subjects of the same state commit robbery upon each *other, upon the high sea, it is piracy. If the subjects of dif- [152] ferent states commit robbery upon each other, upon the high sea,—if their respective states be in amity, it is piracy; if at enmity, it is not; for it is a general rule, that enemies never can commit piracy on each other, their depredations being deemed mere acts of hostility. 1 Sir L. Jenk. 94. 4 Inst. 154.

But if a commissioned ship, by mistake, capture a vessel belonging to the subjects of a friendly power, imagining it to belong to an enemy, and bring it without damage into port for condemnation, this is not piracy. See 1 Sir L. Jenk. xciv.

Steal, take, and carry away.] This is proved in the same manner as in robbery. Molloy, 64. s. 18. If persons at sea force the captain of a vessel to sell part of his cargo for less than its value, it is piracy. 3 T. R. 783. See 28 H. 8. c. 15. s. 4. But if a pirate attack a vessel, and before he obtains possession of her, the captain, in order to redeem her, give an oath to pay a sum certain, this is no piracy, for there was no taking. Molloy, 64. s. 18. But if there be an actual taking, it is piracy, although the pirate afterwards allow the party to proceed on his voyage. 1 Sir L. Jenk. xcviii.

Indictment for Stealing from a Wreck.

Herefordshire, being the next adjoining shire within England (where the King's writ runneth) to the county of Glamorgan, in Wales, to wit: The jurors for our lord the King, upon their oath, present, that on the third day of May, in the third year of the reign of our sovereign lord George the fourth, a certain ship called the *Catherine*, the property of certain persons to the jurors aforesaid unknown, was *stranded* in his said Majesty's dominions, to wit, at the parish of Pyle and Kenfigg in the county of Glamorgan, and that J. S., late of the parish aforesaid in the county aforesaid, labourer, then and there, with force and arms, twenty pounds weight of cotton of the value of twenty shillings, the goods, chattels, merchandise, and effects of certain persons to the jurors aforesaid unknown, from the said ship so *stranded* as aforesaid, then and there feloniously did plunder. steal, take away, and destroy: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *You may add a second count, stating that*, on the day and year aforesaid, in the parish aforesaid, in the county last aforesaid, a certain other ship called the Catherine, the property of, &c. was *in distress*, within his said Majesty's dominions, to wit, at, &c., *and then state the larceny of the cotton from the* "said ship so being in distress as aforesaid." *You may add a* [153] *third count, *stating the ship to have been* "wrecked." *And you may add a fourth count, stating the ship to have been* "cast on shore." *The venue may be laid either in the county in which the offence was committed, or in the next adjoining county; or if committed in Wales, it may be laid in the next adjoining English county.* 26 G. 2. c. 19. s. 8.

Felony, death. 26 G. 2. c. 19. s. 1. *However, if the goods stolen be of small value, and taken without circumstances of cruelty, outrage, or violence, the prosecutor may indict the offender as for petit larceny.* Id. s. 2.

Evidence.

Prove the offence, in the same manner as a larceny; see ante, p. 114—127; and prove the goods to have been taken from the vessel named in the indictment, whilst stranded, or in distress, or wrecked, or cast ashore, according as it is alleged. It is immaterial whether any living creature be on board the vessel or not, at the time of the offence committed. 26 G. 2. c. 19. s. 1. The value of the goods also is immaterial.

Indictment for a misdemeanor in Receiving Stolen Goods.

Commencement as ante, p. 113.] One silver tankard of the value of six pounds, of the goods and chattles of one J. N., by a certain ill disposed person to the jurors aforesaid unknown, then lately before feloniously stolen, taken, and carried away, of the said ill disposed person, unlawfully and unjustly did receive and have (he the said J. S. then and there well knowing the said goods and chattles to have been feloniously stolen, taken, and carried away): to the great damage of the said J. N., against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *It is not necessary to aver that the principal has not been convicted.* R. *v.* Baxter, 5 T. R. 83. *The venue may be laid in the county in which the defendant shall* "*receive or have*" *the goods, although the goods were stolen in another part of the united kingdom.* 44 G. 3. c. 92. s. 8.

Fine, imprisonment, or whipping. 22 G. 3. c. 58. s. 1. *Buying or receiving goods stolen from a ship or vessel on the river Thames, knowing the same to be stolen, is punishable with transportation for fourteen years.* 2 G. 2. c. 28. s. 12. *Buying or receiving jewels, gold or silver plate, or watches, knowing the same to have been stolen, is felony, and punishable with transportation for fourteen years.* 10 G. 3. c. 48. *Buying or receiving lead, iron, copper, brass, bell metal, or solder, knowing the same to be stolen or unlawfully come by, is punishable with transportation for fourteen years.* 29 G. 2. c. 30. s. 1. **Buying or receiving pewter, knowing the same* [154] *to be stolen or unlawfully come by, punishable with transportation for seven years, or imprisonment and whipping.* 21 G. 3. c. 69.

Evidence.

Prove a larceny of the goods mentioned in the indictment, as directed ante, p. 114—127. Prove it to have been committed by some person unknown; or, if known, his name must be stated in the indictment, see ante, p. 11, and he is a competent witness to prove the larceny, and indeed the whole case. R. *v.* Haslam, 1 Leach, 418. But it is competent to the defendant to disprove the guilt of the principal. Fost. 365. It may be necessary to add, that the stat. 22 G. 3. c. 58. s. 1, upon which the above indictment is framed, does not extend to money, R. *v.* Guy, 1 Leach, 241, or bank notes. R. *v.* Sadi, et al. 1 Leach, 468.

Having proved the larceny, you must prove the goods stolen to have been received *or* bought by the defendant, the words in the statute being "receive *or* buy." See 2 East, P. C. 765. Proof that the goods were found in his possession, is good presumptive evidence of this fact; or it may be proved by the principal felon. If, however, it be proved that the defendant not only received the articles, but also assisted in stealing them, he must, it seems be acquitted; for the misdemeanor is merged in the felony. See 2 East, P. C. 767, 768.

And lastly, it must be proved, that the defendant, at the time he received or bought the goods, knew them to be stolen. This is proved, either directly, by the evidence of the principal felon, or circumstantially, by proving that the defendant bought them very much under the value, 1 Hale, 619, or denied their being in his possession, or the like.

Indictment against the principal and receiver jointly.

After the conclusion of the indictment against the principal, continue it in the same paragraph, thus:] And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., late of the parish aforesaid, in the county aforesaid, labourer, afterwards, to wit, on the fourth day of May, in the year last aforesaid,* at the parish aforesaid, in the county aforesaid, the goods and chattles aforesaid, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, he the said J. S., then and there well knowing the said goods and chattles last aforesaid, to have been feloniously stolen, taken, and carried away: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity.

**Receivers are made accessaries after the fact to the larceny, by* [155] *stat.* 3 W. & M. c. 9. s. 4., and 5 Ann, c. 31. s. 5; *and are punishable with transportation for fourteen years, if indicted thus as accessaries.* 4 G. 1. c. 11. s. 1.

Evidence.

Prove the larceny, as directed, ante, p. 114—127; and prove the offence against the receiver, as directed under the last precedent. If the principal be found guilty of petit larceny merely, the receiver must be acquitted. R. *v.* Evans, Fost. 73.

Indictment against the receiver as accessary, the principal being convicted.

Middlesex, to wit: The jurors for our lord the King, upon their oath, present, that heretofore, to wit, [" *at the general sessions of the delivery of the jail of, &c. &c.—so continuing the caption of the former indictment,—it was presented, that one J. T., late of, &c. continuing the indictment to the end; reciting it however in the past, and not in the present tense.*] Upon which said indictment the said J. T., at the session of jail delivery aforesaid, was duly convicted of the felony and larceny aforesaid: as by the record thereof more fully and at large appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., late of the parish aforesaid, labourer, after the committing of the said larceny and felony as aforesaid, to wit, on the fourth day of May, in the year last aforesaid, [*&c. as in the last precedent, from the* *.]

Evidence.

Give in evidence an examined copy of the record of the conviction of the principal, as proof of his conviction, and of the commission of the larceny. An examined copy will be sufficient; because the statement of the indictment and conviction of the principal, is matter of inducement merely. See ante, p. 80. It is not necessary that it should appear from the record, that the principal was attainted; if it appear that he was convicted, it is sufficient. R. *v.* Baldwin, 3 Camp. 265. R. *v.* Hyman, 2 East, P. C. 782. And although the record be erroneous, it is good evidence against the accessary, until reversed. R. *v.* Baldwin, 3 Camp. 265.

After thus proving the larceny and conviction, prove the offence of receiving the stolen property, as directed, ante, p. 154.

If the goods stolen have been altered between the time of the
[156] larceny and that of the receipt, so as to pass under a new *denomination, the indictment should correspond with the fact. And where the principal was indicted for sheep stealing, and the accessary charged with receiving "twenty pounds of mutton, parcel of the goods," &c., it was holden good. R. *v.* Cowel, et al. 2 East, P. C. 617.

If the principal have been convicted of petit larceny merely, the receiver should not be put upon his trial. R. *v.* Evans, Fost. 73.

SECT. 2.

EMBEZZLEMENT.

Indictment for embezzlement by clerks, &c.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B. in the county of M. labourer, on the third day of May, in the third year of the reign of our sovereign

lord George the Fourth, at the parish aforesaid, in the county aforesaid, was employed in the capacity of a clerk to one J. N., and as such clerk entrusted by the said J. N. to receive money, [*goods, bonds, bills of exchange, notes, bankers' drafts, and other valuable effects and securities*] for him the said J. N.; and being so employed and entrusted as aforesaid, the said J. S., by virtue of such employment, then and there did receive and take into his possession ten sovereigns of the current coin of the realm in monies numbered [*one piece of linen cloth of the value of two pounds, one bond for the payment of fifty pounds and of the value of fifty pounds, one bill of exchange for the payment of fifty pounds and of the value of fifty pounds, two bank notes for the payment of five pounds each, and of the value of ten pounds, and one banker's draft for the payment of ten pounds and of the value of ten pounds,*] for and on account of the said J. N., his said master and employer; and that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, fraudulently and feloniously did embezzle and make away with the said sovereigns, [*linen cloth, bond, bill of exchange, &c.*] so received by him as aforesaid: and so the jurors aforesaid, upon their oath aforesaid do say, that the said J. S. did then and there, in manner and form aforesaid, feloniously steal, take, and carry away the said sovereigns, [*linen cloth, bond, bill of exchange, &c.*] from the said J. S., his said master and employer, for whose use, and on whose account, he the said J. S., so employed as aforesaid, received the same, *and took the same into his pos- [157] session, the said sovereigns, [*linen cloth, &c.*] being, at the time of the committing of the felony aforesaid, the property of the said J. N. [*and the said several sums of money, payable and secured by and upon the said bond, bill of exchange, bank notes, and banker's draft, respectively, as aforesaid, being then due and unsatisfied to the said J. N. the proprietor thereof:*] against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *Add other counts, varying the statement, if they be necessary; and add a count for a larceny at common law, which is allowable.* R. *v.* Johnson, 3 M. & S. 549. *It is not sufficient to say, that the defendant received and embezzled "nineteen pounds," but you must specify whether in coin, or bills, or notes, &c. &c.* R. *v.* Lindsey, 2 Russel, 1236. *The indictment must also allege the goods, &c. embezzled, to be the property of the masters.* R. *v.* M'Gregor, 3 B. & P. 106. As to the venue, see ante, p. 5, 6.

Declared to be a larceny, and punishable with transportation for not more than fourteen years, 39 G. 3. c. 85, *or other such punishment as is inflicted for larceny.* See 8 M. & S. 556. *As to embezzlement by servants generally,* see 21 H. 8. c. 7, 33 H. 6. c. 1. *(which, however, are nearly obsolete in practice,)* and see ante, p. 125, 126. *As to embezzlements by officers or servants of the bank of England,* see 15 G. 2. c. 13. s. 12; *as to embezzlements by persons to whom money or securities for money shall be issued for the public service,* see 50 G. 3. c. 59. s. 1, 2; *as to embezzlements by bankers and others, of securities lodged in their hands for special purposes,* see 52 G. 3 c. 63; *and as to embezzlements of letters, &c. by servants of the post office,* see 52 G. 3. c. 143. s. 2. 5 G. 3. c. 25. s. 19. 7 G. 3. c. 50. s. 3.

Evidence.

Prove that the defendant, at the time he received the money, &c., was employed by J. N. in the capacity of clerk; &c. as stated in the indictment.

Prove that he received the money, &c. stated in the indictment, or some part thereof, on the account, and for the use of J. N.; the same rule prevails in this respect, as in the proof of the goods taken in the case of larceny. See ante, p. 114. Money received by the defendant from

the master himself, however, for the purpose of paying it to a third person, is not within the meaning of the act. R. *v.* Peck, 2 Russel, 1233. But where the master gave a stranger some marked money, for the purpose of purchasing goods from the master's shopman, in order to try the shopman's fidelity, which he doubted; the stranger bought the goods, and the shopman embezzled the money; the judges held this to be a case within the act. R. *v.* Headge, 2 Leach, 1033. It must appear
[158] also, that the money, &c. so embezzled, was never, *even constructively, in the possession of the master; for if it were, the offence would amount to larceny at common law, see ante, p. 125, 126, and the defendant should therefore be acquitted upon an indictment on this statute. And this is the reason why it is advisable to add a count for a larceny at common law.

And lastly, prove that the defendant embezzled the money, &c. so received, or some part of it. The usual presumptive evidence of this fact is, that the defendant never accounted with his master for the money, &c. so received by him, or denied his having received it. Where the defendant received and paid sums to a large amount for his master, and kept a cash account of them, which he balanced every quarter; it was holden by Garrow, B., that it was not sufficient to prove that there appeared by this cash book to be a large balance due to the prosecutor, in the hands of the defendant, unaccounted for, even though accompanied with a confession that he had appropriated some of the money in his hands to his own use; but that it was incumbent upon the prosecutor to select and prove some distinct and specific act of receipt and embezzlement. R. *v.* Hebb, 2 Russel, 1244.

Sect. 3.

CHEATING.

Indictment for obtaining goods, &c. by false pretences.

Commencement, as ante, p. 113.] In the county aforesaid, unlawfully, knowingly, and designedly, did falsely pretend to one J. N. [that he the said J. S. then was the servant of one K. O., of Saint Paul's Church Yard, in the city of London, tailor, (the said K. O., then and long before, being well known to the said J. N., and a customer of the said J. N. in his business, and way of trade, as a woollen draper,) and that the said J. S. was then sent by the said K. O. to the said J. N. for five yards of certain superfine woollen cloth:] By means of which said false pretences, the said J. S. did then and there unlawfully, knowingly, and designedly, obtain from the said J. N. [five yards of superfine woollen cloth, of the value of five pounds, of the goods, wares, and merchandises of the said J. N.] with intent then and there to cheat and defraud him the said J. N. of the same; whereas in truth and in fact [the said J. S. was not then the servant of the said K. O., and whereas in truth and in fact the said J. N. was not then, or at any other time, sent by the said K. O. to the said J. N., for the said cloth, or for any cloth whatsoever:] to the great damage and deception of the said J. N. [to the evil example of all
[159] others in the like case offending, against the form of *the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Punishable by fine and imprisonment, or whipping, or by transportation for seven years. 30 G. 2. c. 24. s. 1. 52 G 3. c. 64. *The stat* 30 G. 2. c. 24. *is confined to money, goods, wares, and merchandise obtained by false pretences; the stat.* 52 G. 3. c. 64, *extends it to bonds, bills of exchange, bank notes, promissory notes and other securities for the payment of money, and to warrants and orders for the payment of money, or for the delivery or transfer of goods, or other valuable things.*

The indictment must set forth the pretences. Where it alleged the money to have been obtained by "*false pretences*," without specifyng them, it was holden to be error, and the judgment was reversed. R. *v.* Mason, 2 T. R. 581. If indeed, it were for a conspiracy to obtain money by false pretences, it would be otherwise. 2 Barn. & Ald. 204.

And the pretences must be set forth with sufficient certainty. But where the pretence alleged was a wager made "with a colonel in the army, then at Bath," without naming him: the court held it to be sufficient; for probably the defendant at the time did not mention the name of the colonel. R. *v.* Young, in error, 3 T. R. 98.

As to the false pretences which are within the meaning of the act, it may be necessary to state that the preceding statute upon the subject, namely, the stat. 33 H. 8. c. 1. extended only to cases where the money, &c. was obtained by means of a false token or counterfeit letter in the name of another; but this provision not being deemed sufficiently extensive, this stat. 30 G. 2. c. 24, was made, for the purpose of including all false pretences whatsoever. Where a carrier, falsely pretending that he had carried certain goods to A. B., demanded and thereupon obtained from the consignor, sixteen shillings for the carriage of them, it was holden to be within the statute. R. *v.* Coleman, 2 East, P. C. 672. Where the foreman of a manufacturer, who was in the habit of receiving from his master money to pay the workmen, obtained from him, by means of false written accounts of the wages earned by the men, more than the men had earned, or he had paid them: the judges held it to be within the act; they said that all cases, where the false pretence creates the credit, are within the statute; and here the defendant would not have obtained the excess above what was really due to the workmen, were it not for the false account he had delivered to his master. R. *v.* Witchell, 2 East, P. C. 830. Where the defendant falsely pretended to J. N., that he was entrusted by the *Duke de Lauzun*, to take some horses from Ireland to London for him, and that he had been detained so long by contrary winds, his money was all spent; by means of which representation he induced J. N. to advance him money: this was holden to be within the act. R. *v.* Villeneuve, 3 T. R. 104, cit. So, [160] where the defendants, falsely pretending that they had made a bet with A. B. that one of them should run ten miles within an hour, prevailed upon J. N. to join them in the bet, and obtained from him twenty guineas as his share in it; the judges held this to be within the statute, notwithstanding the pretence were probably one against which common prudence might have guarded. R. *v.* Young et al. in error. 3 T. R. 98.

If a person obtain goods from another, upon giving him in payment his cheque upon a banker, with whom in fact he has no account, this (although not indictable as a fraud at common law, R. *v.* Lara, 6 T. R. 565,) is a false pretence within the meaning of this act. R. *v.* Jackson et al. 3 Camp. 370. Where a man obtained goods and money, for a forged note of hand for ten shillings and sixpence; the judges held it to be a false pretence within this act; R. *v.* Freeth, 2 Russel, 1395; and the misdemeanor in this case was not merged in the felony, for in fact no felony was committed, such notes under twenty shillings being void, by stat. 15 G. 3. c. 51. But if a man merely assume the name of another, to whom

money is required to be paid by a genuine instrument, this is not within the act. R. *v.* Story, 2 Russel, 1392. It is no objection, however, that the false representation is of a transaction to take place at a future time. R. *v.* Young, in error, 3 T. R. 98.

The indictment also must negative the pretences, by special averment, as in the above precedent; and where such an averment was omitted, it was holden to be error, and the judgment was reversed. R. *v.* Perrot, 2 M. & S. 379.

Evidence.

The prosecutor must prove the pretence, as stated in the indictment; any variance in substance between the pretence laid and that proved, will be fatal. Where the pretence laid was, that the defendant said, "that *he had paid* a sum of money into the bank of England," and the proof was, that he said that the money had been paid into the bank, without saying by whom: the defendant was acquitted for the variance, Lord Ellenborough holding that the assertions were different in substance. R. *v.* Plestow, 1 Camp. 494. See R. *v.* Douglas, Id. 212.

He must next prove that the goods, &c. stated in the indictment, or part of them (for the rule in this respect is the same as in larceny, see ante, p. 114.), was obtained from him by means of these pretences. If the indictment charge the defendant with having obtained, by means of certain false pretences, from J. B. a servant of J. N., the sum of three shillings and sixpence, the monies of J. N.; and the evidence be [161] *that J. B. in fact paid the three shillings and sixpence out of his own money in the first instance, and was afterwards repaid by J. N.: this would be a fatal variance. R. *v.* Douglas, 1 Camp. 212. But it appearing afterwards, in this case, that J. B. had at the time, more money belonging to J. N. in his possession, than the sum so paid by him, this was holden to support the averment, although he had no orders from J. N. to pay it. Id.

As to the intent, it may be implied sufficiently from the facts of the case. If the evidence, however, go further, and prove not only an intent to cheat or defraud, but also go the length of establishing a pre-existing *animus furandi*, and a constructive taking, such as to constitute a larceny; the defendant must be acquitted; see R. *v.* Pear, 2 East, P. C. 689; because the misdemeanor in that case is merged in the felony. It must be acknowledged, however, that in many cases it may be difficult to determine the line which divides this offence from larceny where there has been a constructive taking. See ante, p. 122—124.

Lastly, it must be proved, that the pretences made use of were false in fact; or, in other words, the averments negativing the pretences, must be proved. But it does not seem to be essential that they should all be proved; if so many of them as shew the falsity of the substance of the pretence, be proved, it should seem to be sufficient. As, in the present instance, if it were to appear in evidence, that the defendant was really the servant of K. O., yet if it also appear that he had no directions from him to get the cloth in question, and that after he had obtained it, he converted it to his own use, it would be sufficient. Where the defendants were charged with obtaining money by colour and pretence of their being collectors of the property tax, and it appeared in evidence that they had in fact been appointed collectors by the commissioners, though in an informal manner: this was holden not to be a *false* pretence, within the meaning of the act. R. *v.* Dobson, 7 East, 218.

Indictment for obtaining money, &c. by means of a counterfeit letter, &c.

Commencement, as ante, p. 113.] In the county aforesaid, a certain false and counterfeit letter, in the name of one J. H., as a true letter of the proper handwriting of him the said J. H. falsely, fraudulently, and deceitfully to one J. N. did deliver (the said J. H. being then and long before, a special friend and acquaintance of him the said J. N.): in and by which said false and counterfeit letter, it was mentioned, that the said J. H. desired the said J. N. to supply the bearer thereof, Mr. J. S., with the sum of sixty pounds, and place it to the account of him the said J. H.; and which said false and *counterfeit letter, is as [162] follows, that is to say [*here insert the letter verbatim:*] by colour and means of which said counterfeit letter, the said J. S., on the day and year aforesaid, in the parish aforesaid, in the county aforesaid, unlawfully, falsely, fraudulently, and deceitfully did obtain, and get into his hands and possession, of and from him the said J. N., sixty pieces of gold coin of the proper coin of this realm, called sovereigns, of the monies of the said J. N.; and the said J. S. of the money last aforesaid, did then and there falsely, deceitfully, and unlawfully defraud the said J. N.: whereas in truth and in fact, the said J. H. never did write or send, or cause to be written or sent, any such letter to the said J. N., desiring the said J. N. to supply the said J. S. with any sum of money whatever. To the great damage and deceit of the said J. N., to the evil example of all others in the like case of offending, against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Punished by imprisonment or corporal punishment. 33 H. 8. c. 1. s. 1. *The statute extends to false privy tokens, as well as counterfeit letters.* Id. See R. *v.* Memos, 2 Str. 1127, and see 1 Hawk. c. 71. 2 East, P. C. 673. *It also extends to "money, goods, chattels, jewels, and other things."*

Evidence.

Prove the delivery of the letter; give the letter itself in evidence; and take care that it correspond with the record, for any material variance, it should seem, will be fatal: see ante, p. 19, 20, 21, 64: prove the money to have been given to the defendant, in consequence of the letter: and prove the letter to be a forgery. The difference between this offence and the forgery of a warrant or order for payment of money, or delivery of goods, within stat. 7 G. 2. c. 22, is, that in the latter case, the warrant or order must be such as is compulsory upon the person in whose possession the money or goods are: R. *v.* Williams, 1 Leach, 114, and see post: but in this case, a letter containing a mere request, with which the party may comply or not, at his option, will be sufficient. In fact, it must not appear to be compulsory, or such an instrument as is within the meaning of the stat. 7 G. 2. c. 22, otherwise the defendant must be acquitted; for whatever may have been the construction this statute would formerly admit of, in this respect the misdemeanor is now merged in the felony.

Indictment for Selling by False Scales.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S. late of the parish of B. in the *county of M. [*grocer,*] on the third day of May in the third year of [163]

the reign of our sovereign lord George the fourth, and from thence until the taking of this inquisition, did use and exercise the trade and business of a [*grocer*,] and during that time did deal in the buying and selling by weight of [*teas, sugars, spices,*] and of divers other goods, wares, and merchandises, to wit, at the parish aforesaid in the county aforesaid; and that the said J. S., being a person of a wicked and depraved mind, and contriving and fraudulently intending to cheat and defraud the subjects of our said lord the King, whilst he was and continued to be a grocer as aforesaid, to wit, on the said third day of May in the year last aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, at the parish aforesaid in the county aforesaid, knowingly, wilfully, falsely, fraudulently, and deceitfully did keep in a certain shop there situate, wherein he the said J. S. did so as aforesaid carry on his said trade, a certain false pair of scales for the weighing of goods, wares, and merchandises, by him sold in the way of his said trade, and which said scales were then and there by artful and deceitful means and contrivance so made and constructed as to cause the goods, wares, and merchandises, weighed in and sold thereby, to appear of greater weight, to wit, of a greater weight by two ounces in every quantity of goods weighed thereby, than the real and true weight thereof; and that the said J. S., well knowing the said scales to be false as aforesaid, did then and there, to wit, on the several days and times aforesaid, at the parish aforesaid in the county aforesaid, wilfully, falsely, fraudulently, and deceitfully sell and utter to divers subjects of our lord the King, divers goods, wares, and merchandises, in the way of his said trade, weighed in and sold by the said false scales, and which goods, wares, and merchandises, by reason of their being so weighed in the said false scales, were then and there very much deficient and short of their true and just weight: to the great damage and deceit of his Majesty's said subjects, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

If you can prove any particular instance of a sale by those scales, to a particular person, you may add a count upon it; or if you think your evidence not sufficiently specific to maintain the count above given, you may add a count or counts in a more general form. See 6 *Went.* 389. *Stating the sale to have been to "divers subjects to the jurors unknown," has been holden sufficient.* R. *v.* Gibbs, 1 Str. 497. *An indictment for selling by false weights or measures, may readily be framed from the above precedent.*

This is a misdemeanor at common law.

Evidence.

[*164] Prove that the defendant carries on the business mentioned in the indictment; that the false scales described in the indictment were found in his shop or warehouse, &c.; and that he has used them in weighing goods sold by him to his customers. If you have proof that the scales were used by his shopmen or servants, it will be sufficient, as it will be presumed that they were used by his orders.

SECT. 4.

BURGLARY.

Indictment for Burglary and Larceny.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S. late of the parish of B. in the county of M. labourer, on the third day of May, in the third year of the reign of our sovereign lord George the fourth, about the hour of eleven in the night of the same day, with force and arms, at the parish aforesaid in the county aforesaid, the dwelling house of one J. N. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of one K. O. in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take, and carry away; and then and there in the said dwelling house, one silver sugar basin of the value of three pounds, six silver table spoons of the value of three pounds, and twelve silver tea spoons of the value of two pounds, of the goods and chattels of the said K. O., in the said dwelling house then and there being found, then and there feloniously and burglariously did steal, take, and carry away: against the peace of our lord the King, his crown and dignity. *If there be any doubt as to the ownership of the house or goods, you may add other counts accordingly. Also, as burglary is a breaking and entering of a dwelling house, with intent to commit a felony,* (*and whether a felony at common law or by statute, immaterial,* 1 Hawk. c. 38. s. 38,) *if there be any doubt of the intent with which the offence was committed, it may be varied in different counts accordingly.*

Felony, death. 18 El. c. 7, and see 1 Ed. 6. c. 12.

Evidence.

In order to maintain this indictment, the prosecutor must prove that the defendant broke and entered the dwelling house of J. N., in the night time, with an intent to steal the goods of K. O.; and whether he succeed or fail in this, he may proceed to prove a larceny of the goods of K. O. from the dwelling house of J. N., in the manner directed, ante, p. 135; and *if he succeed in proving the larceny, but fail in [165] proving it to have been committed in the dwelling house of J. N., the defendant shall be convicted of the simple larceny.

Having made these few general obervations, we shall now proceed to state the evidence in burglary more particularly.

About the hour of eleven in the night.] With reference to this part of our subject, the day may be divided into three parts; daylight, twilight, and night. If the breaking and entering be in the night, it is burglary; if in daylight, it is not. If it be committed during twilight, then, if there be not daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is burglary; otherwise, not. 3 Inst. 63. 1 Hale, 550. 1 Hawk. c. 38. s. 2. 4 Bl. Com. 224, but this does not extend to moonlight; for then many midnight burglaries would go unpunished. 4 Bl. Com. 224. 1 Hale, 551.

And the breaking and entering must both be committed in the night time; if the breaking be in the day, and the entering in the night, or the breaking in the night and the entering in the day, it is no burglary. 1 Hale, 551. But the breaking may be on one night, and the entry on another. 1 Hale, 551.

The dwelling house of J. N.] To prove this allegation, the prosecutor must prove that the defendant broke and entered the dwelling house of J. N., in which he was in the habit of residing, 3 Inst. 64. or, at least, some barn, stable, or other outhouse, parcel of and belonging to the dwelling house, and either within the same curtilage, 1 Hale, 558. 3 Inst. 64. 1 Hawk. c. 38. s. 21, or under the same roof with it, if there be no curtilage. R. *v.* Brown, 2 East, P. C. 493. R. *v.* Garland, 1 Leach, 144. And evidence of a breaking and entering of the outhouse, thus, will maintain an indictment charging a breaking and entry of the dwelling house. R. *v.* Garland, 1 Leach, 144.

Every permanent building, in which the renter or owner, or his family dwell and lie, is deemed a dwelling house, and burglary may be committed in it. Even a set of chambers in an inn of court or college, is deemed a distinct dwelling house, for this purpose. 1 Hale, 556. And the mere temporary absence of the owner and his family, will not deprive the house of this protection the law gives it: as, for instance, if a man have a town and country house, in which he resides alternately, and whilst he and his family are residing for the season in the country house, the town house is broken and entered; 1 Hale, 556; or if a man lock up his house and go a journey, and during his absence it be broken and entered; R. *v.* Murray & al., 2 East, P. C. 496, Fost. 77, cit.; or if a barrister have a set of chambers, in which he resides during the term only, and during the vacation they be broken and entered: 1 Hale, [166] 556: in *these and the like cases the houses and set of chambers, respectively, even although no person actually resided in them at the time, must be deemed dwelling houses, and the breaking and entering of them burglary; provided it appear that the owners, when they left them, had an intention to return to them. 1 Hale, 566. Fost. 77. R. *v.* Nutbrown, Fost. 76. But burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it; 1 Hawk. c. 38. s. 35. 1 Hale, 557; because it is a temporary, not a permanent, edifice. So, breaking open a house, in which no man resides or is in the habit of residing, is no burglary; for it is not a dwelling house. If a porter lie in a warehouse, for the purpose of watching goods, R. *v.* Smith, 2 East, P. C. 497, or a servant lie in a barn, in order to watch thieves, R. *v.* Brown, 2 East, P. C. 502, this does not make the warehouse or barn a dwelling house, in which burglary can be committed. So, where the landlord of a dwelling house, after the tenant had quitted it, put a servant into it, to sleep there at night, until he should relet it to another tenant, but he had no intention to reside in it himself; the judges held that this could not be deemed the dwelling house of the landlord. R. *v.* Davies, 2 Leach, 876. So, where the tenant had put all his goods and furniture into the house, preparatory to his removing to it with his family, but neither he nor any of his family had as yet slept in it; it was holden not to be a dwelling house, in which burglary could be committed. R. *v.* Hallard, 2 East, P. C. 498. R. *v.* Thompson, Id. & 2 Leach, 771. And the same has been ruled, where, under such circumstances, the tenant had put a person (not being one of his family) into the house, for the protection of the goods and furniture in it, until it should be ready for his residence. R. *v.* Harris, 2 Leach 701. R. *v.* Fuller, 2 East, P. C. 498, 2 Leach, 187. See R. *v.* Jones & al. 2 East, 499.

A dwelling house may be divided, so as to form two or more dwelling houses (within the meaning of the word, in the definition of burglary,) by letting a part of it to a tenant; provided there be no internal communication between the part so let and the remainder of the dwelling house.

Upon an indictment for burglary, it appeared that the house in which the burglary was alleged to have been committed, formed the centre of a building, having two wings; in one of which A. lived, and the other consisted of the dwelling houses of B. & C. respectively; the centre consisted of three manufactories, in one of which A. B. D. and other persons, were jointly concerned, and of the remaining two D. was the sole proprietor. C. was merely in the employment of D. There was no internal communication between the centre building and the houses of A. & B., nor between it and the house of C., excepting a window in the house of C. which looked into a passage that ran *the [167] whole length of the centre building. One of the counts in the indictment alleged the centre building to be the dwelling house of C.: but the judges held that the window merely, was not such an internal communication, as could make the centre building be deemed parcel of C.'s house. R. *v.* Eggington & al. 2 B. & P. 508. Where a part of a dwelling house, however, is severed by letting, it thereby becomes, (considered as a distinct house) the subject of burglary, or not, according to circumstances. If a man hire a shop, parcel of another man's house, and unconnected with it by internal communication; and the tenant work or trade in it, but never lie there; it is no dwelling house, and burglary cannot be committed in it. 1 Hale, 558. If on the contrary he or any part of his family lie there, it is deemed his dwelling house, and may be laid to be so in an indictment for burglary. Id. and see R. *v.* Rogers, 1 Leach, 89. 428. But if the owner of the dwelling house let the shop, which is unconnected by internal communication with the house, and also let some rooms in the house, which are connected with the other parts of it, to the same person; and the tenant or some of his family sleep in the rooms; a breaking and entering of the shop, in that case, will be burglary, and it may be laid to be committed in the dwelling house of the landlord. R. *v.* Gibson & al. 1 Leach, 357.

As to the ownership of the dwelling house: Where it is laid to be the dwelling house of J. N., proof that it was occupied by his wife and her establishment alone, will support the indictment; and in such a case, it should always be alleged in the indictment to be the dwelling house of the husband, even although the wife live separate from him, and the house have been taken by her, and she have paid the rent, taxes, &c. R. *v.* Farre, Kel. 43. and see Boggett *v.* Frier, 11 East, 301. So if a man occupy a dwelling house by his servants, and do not reside in it himself, the indictment must allege it to be the dwelling house of the master, and evidence of an occupation by his servants will maintain the indictment. Where three persons were in partnership in a bank and brewhouse, the business of which was transacted in the lower rooms of the house in question, and a cooper in the service of the partnership, at weekly wages, lived with his family in the upper rooms, which communicated with the lower rooms by means of a trap door and a ladder, but there was also a separate entrance to these rooms from without; the lower rooms were broken and entered, and property stolen from them; and the judges held that the house was well laid in the indictment to be the dwelling house of the partners. R. *v.* Stockton & al. 2 Taunt. 339. 2 Leach, 1015. So, where apartments in the house of a corporation are appropriated as lodgings for servants of the corporation, a burglary committed in them must be laid to have been committed in the dwelling house of the *corporation. R. *v.* Picket, 2 East, P. C. 501. R. *v.* Hawkins, [168] Fost. 38, and see R. *v.* Maynard, 2 East, P. C. 501. So, where apartments are assigned to any person in a Royal palace, a burglary

committed in them must be laid to have been committed in the mansion of the King. R. *v.* Williams & al. 1 Hale, 522, and see Kel. 27. 1 Leach, 324. But where a company in the country rented a house in London for their agent, in the upper part of which he resided with his family, and in the lower part transacted his business, it is reported to have been holden by Graham, B. & Grose, J., that a burglary in the house was well laid to have been committed in the dwelling house of the agent. R. *v.* Margette & al. 2 Leach, 930. Where a house, rented by A. & B. partners, was divided into two houses, for the convenience of their respective families, the family of A. residing in one, the family of B. in the other, and there was no internal communication between them: a burglary in the house of A. was holden to be well laid to have been committed in the dwelling house of A., and not of the partners, although the rent of both houses was paid jointly out of the partnership funds. R. *v.* Jones, 1 Leach, 537.

Where the room occupied by a guest in an inn, is broken and entered in the night time, an indictment for the burglary must lay it to have been committed in the dwelling house of the innkeeper; 1 Hale, 557. R. *v.* Prosser, 2 East, 502; and the same in all other cases where the occupier has the use merely, and no interest, in the apartments he occupies. See 1 Hawk. c. 38. s. 26. Apartments let to lodgers, however, admit of a very different consideration. If part of a house be let to a lodger, who sleeps there, and no other person resides in the remainder of the house, a burglary in the lodgings must be laid to have been committed in the dwelling house of the lodger. Where a coachman rented the loft over a coach house and stables, and he and his family resided in it, a burglary committed in it was holden to be well laid to have been committed in the dwelling house of the coachman. R. *v.* Turner, 1 Leach, 305. So, if the house be let out to several lodgers, and the owner do not reside in it, a burglary in it must be alleged to have been committed in the dwelling house of that person whose lodgings were broken and entered. R. *v.* Rogers, 1 Leach, 89, and see R. *v.* Trapshair, 1 Leach, 427. And where a lodger occupied a sleeping room on the first floor, and a workshop in the attic, and the rest of the house was occupied by other lodgers, a burglary in the workshop was holden by the judges to be well laid to have been committed in the dwelling house of the lodger who rented it. R. *v.* Carrell, 1 Leach, 237. But if the owner of the house reside in a part of it, and let the rest out in lodgings,—then if the part occupied by the lodger be severed from that occupied by the owner, that is,
[169] if there be no internal communication between *them, and the lodger and owner enter the house by different outer doors, a burglary in the part occupied by each respectively must be laid to have been committed in the dwelling house of the person so occupying it; but if they be not severed, and the lodger and owner enter by the same outer door, then the burglary must be laid to have been committed in the dwelling house of the owner. 1 Leach, 90 n. Kel. 83. 84. 2 East, P. C. 503.

In all cases of this description, if there be any the slightest doubt whether the house broken and entered should be described as the dwelling house of A., B., or C., the pleader should obviate the difficulty by inserting counts alleging it to be the dwelling house of A. B. & C. respectively.

It may be necessary to mention, that a man cannot be indicted for a burglary in his own house. Therefore if the owner of a house break and enter the room of his lodger, and steal his goods, he can only be convicted of the larceny. Kel. 84. 2 East, P. C. 502, 506.

It may also be necessary to mention, that a church may be the subject of burglary. 3 Inst. 64. 1 Hale, 556.

And lastly, as to the local description of the house: it must be proved strictly as laid; if there be the slightest variance between the indictment and evidence, in the parish, &c. where the house is alleged to be situate, the defendant must be acquitted of the burglary. Ante, p. 15. So, also, if the house be not proved to be a dwelling house, *vide supra*, and to be the dwelling house of J. N., see ante, p. 11. R. *v.* White, 1 Leach, 252, the defendant must be acquitted of the burglary.

Break.] There must be a breaking of the house, either actual or constructive, to constitute burglary. If a man leave his doors or windows open, and another enter therein with intent to commit a felony, it is no burglary. 1 Hale, 551. 3 Inst. 64.

An actual breaking is, where the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of the house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting the latch, or unlooses any other fastening to doors or windows which the owner has provided. 3 Inst. 64. 1 Hale, 552. But if the door or window be not latched or fastened, as, for instance, if the offender enter the house by opening the flap doors of a cellar, which are not latched, bolted, or otherwise fastened at the time, but merely kept closed by their own weight, is not a burglary. R. *v.* Callan, 2 Russel, 903. See R. *v.* Brown, 2 East, P. C. 487. cont.

A constructive breaking, is where the offender, with intent to commit a felony, obtains admission by some artifice or trick, *for [170] the purpose of effecting it. As, for instance, if a man knock at a door, and upon its being opened, rush in, with a felonious intent; or, upon pretence of taking lodgings, fall upon the landlord and rob him; or procure a constable to gain admittance, in order to search for traitors, and then bind the constable and rob the house: all these entries have been adjudged burglarious, although there were no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. 1 Hawk. c. 38. s. 9, 10. 4 Bl. Com. 226. So, where the defendant obtained admission, by promising the boy who was in care of the house some ale; and whilst the boy was gone for the ale, robbed the house: this was holden to be burglary. R. *v.* Hawkins, 2 East, P. C. 485. Nay, if a servant conspire with a robber, and let him into the house by night, this is burglary in both: 1 Hale, 553. 1 Hawk. c. 38. s. 14. R. *v.* Cornwall, 2 Str. 881: for the servant is doing an unlawful act; and the opportunity afforded him of doing it with greater ease, rather aggravates than extenuates the guilt. Obtaining admission to a house, by getting down the chimney, is also burglary; for the chimney is as much closed as the nature of things will admit. 1 Hawk. c. 38. s. 6. See 1 Hale, 552.

And the breaking, necessary to constitute burglary, is not restricted to a breaking of the outer wall or doors or windows of a house: if the thief get admission into the house by the outer door or window being open, and afterwards breaks or unlocks, &c. an inner door, for the purpose of entering one of the rooms, &c. in the house, it is burglary. 1 Hale, 553. R. *v.* Johnson, 2 East, P. C. 488. So, if a servant open his master's chamber door, or the door of any other chamber not immediately within his trust, with a felonious design; or if any other person lodging in the same house, or in a public inn, open and enter another's door, with such evil intent: it is burglary. 1 Hale, 553, 554. It is doubted whether

breaking open cupboards, &c. on the inside of a house, affixed to the freehold, is burglary; see 1 Hale, 527. Fost. 108; but *Mr. J. Foster, in favorem vitæ*, recommends that it should not be so considered. Fost. 109. And clearly, the breaking open chests, &c. in a dwelling house, is not burglary. 1 Hale, 553, 554.

Enter.] And there must be an entry, as well as a breaking to constitute burglary; although we have seen that the entry need not be on the same night of the breaking. Ante, p. 165. 1 Hale, 551. Any, the least degree of entry, however, with any part of the body, or with any instrument held in the hand, is sufficient: as, for instance, after breaking the door or window, &c., to step over the threshold, to put a hand, or a hook, or other instrument in at a window, to draw out goods, or a pis-
[171] tol to demand one's money, are all of them *burglarious entries. 1 Hale, 555. Fost. 108. 1 Hawk. c. 38. s. 11, 12. 3 Inst. 64. And it is even said, that discharging a loaded gun into a house, is a sufficient entry. 1 Hawk. c. 38. s. 11. But there must be an entry: if, for instance, a man assault a house, or even break a hole in it, and before entry the owner fling his money to the thief, it would not be burglary. 1 Hawk. c. 38. s. 3. 1 Hale, 555 So, if the instrument with which the house is broken, happen to enter the house, but without any intention upon the part of the burglar to effect his felonious intent (as, for instance, to draw out the goods) with it, this will not be a sufficient entry to constitute a burglary. R. *v.* Hughes et al. 1 Leach, 406. See R. *v.* Roberts, 2 East, P. C. 487.

With intent, &c.] The intent laid in the indictment, must be, to commit some felony (and whether a felony at common law or by statute is immaterial, 1 Hawk. c. 38 s. 38,) in the dwelling house, such as larceny, murder, rape, &c.; and the intent must be proved as laid. Where the intent laid, was to kill a horse, and the intent proved was merely to lame him, in order to prevent him from running a race, the variance was holden fatal. R. *v.* Dobbs, 2 East, P. C. 513. If the intent laid be to murder, and the intent proved be to beat the party merely, the variance is fatal. 1 Hale, 561. Where the intent laid was to steal, and the intent proved was to carry away the defendant's trunk, containing money which he had formerly embezzled from his master: it was holden, that the offence proved did not even amount to a burglary: for it was no felony for the defendant to remove the money. R. *v.* Dingley, 2 Leach, 840, cit. So, where the intent laid was to steal, and the intent proved, was to rescue uncustomed goods which had been seized, the judges held that the indictment was not sustained by the evidence. R. *v.* Knight et al. 2 East, P. C. 510. So, where the intent laid, was to steal the goods of J. W., and it appeared in evidence, that no goods of any person of the name of J. W. were in the house, but that the name of J. W. had been inserted in the indictment by mistake; the judges held the variance to be fatal, and the defendant was accordingly acquitted. R. *v.* Jenks, 2 East, P. C. 514. ante, p. 63.

The best evidence of the intent, is that the defendant actually committed the felony alleged to have been intended by him; see R. *v.* Locost et al. Kel. 30; or you may give in evidence any other facts from which the intent may be presumed by the jury. See ante, p. 77, 78. If the intent be at all doubtful, you may lay different ways in separate counts.

And then and there in the said dwelling house, &c.] The larceny
[172] in the dwelling house is proved as directed, ante, p. *135. It seems, however, that to convict the defendant of the felony charged to have been committed, it must appear to have been concur-

rent with the burglary; you cannot give evidence of a felony committed at a different time. Where it appeared in evidence, that upon entering the house at three o'clock in the day, the owner found that some persons had removed certain goods to a different part of the house to that in which he had placed them, seemingly for the purpose of stealing them; and the defendants afterwards, on the same evening, having broken and entered the house, were taken in it, before they had attempted to move or carry away any thing: having failed at the trial to prove the burglary, the prosecutor was proceeding to prove the defendants guilty of the antecedent larceny; but the court refused to receive the evidence, saying, that the transactions were perfectly distinct, and that the prosecutor might as well attempt to prove a larceny committed seven years before. R. *v.* Vandercomb & Abbot, 2 Leach, 708.

If you succeed in proving a larceny, but fail in proving it to have been committed in the dwelling house, or the goods to be of the value of forty shillings; and if you also fail in proving the burglary: the defendant may be convicted of the simple larceny. But where two or more are indicted the jury cannot find one guilty of the burglary, and the other of the larceny only. R. *v.* Turner et al. 1 Sid. 171.

Indictment for burglary by breaking out of a house.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, about the hour of eleven in the night of the same day, at the parish aforesaid, in the county aforesaid, being in the dwelling house of J. N. there situate, one silver sugar basin of the value of three pounds, six silver table spoons of the value of three pounds, and twelve silver tea spoons of the value of two pounds, of the goods and chattels of one J. S., in the said dwelling house of J. N. then and there being, then and there in the said dwelling house feloniously did steal, take, and carry away; and that the said J. S., being so as aforesaid in the said dwelling house, and having committed the felony aforesaid, in manner and form aforesaid, he the said J. S. afterwards, to wit, on the same day and year aforesaid, about the hour of eleven in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the said dwelling house of the said J. N. then and there feloniously and burglariously did break, to get out of *the same, and [173] then and there feloniously and burglariously did break and get out of the same: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 12 Ann, st. 1. c. 7. s. 3. *The statute declares entering a dwelling house, by day or night, without breaking the same with intent to commit a felony, (or being in a dwelling house and committing a felony,) and breaking the said house in the night time to get out of the same,—to be burglary.*

Evidence.

Prove a larceny in the dwelling house of J. N., as directed, ante, p. 135, except that the value of the goods is immaterial. And prove a breaking of the house, by the defendant, in the night time, in order to get out of the same. See ante, p. 169.

Indictment for a forcible entry into a freehold, on stat. 5 R. 2. c. 8.

Middlesex, to wit: the jurors for our lord the King, upon their oath present, that one J. N., late of the parish of B., in the county of M., on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, in the parish aforesaid, in the county aforesaid, was seised in his demesne as of fee of and in a certain messuage with the appurtenances, there situate and being; and the said J. N. being so seised thereof as aforesaid,—J. S., late of the parish aforesaid, in the county aforesaid, labourer, afterwards, to wit, on the day and year last aforesaid, in the parish aforesaid, in the county aforesaid, into the said messuage and appurtenances aforesaid, with force and arms, and with strong hand, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there with force and arms, and with strong hand, unlawfully did expel and put out; and the said J. N., from the possession thereof so as aforesaid, with force and arms, and with strong hand, being unlawfully expelled and put out, the said J. S., from the aforesaid third day of May, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage with the appurtenances aforesaid, with force and arms, and with strong hand, unlawfully and injuriously then and there did keep out, and still doth keep out: to the great damage of the said J. N., against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. See the precedents, 4 Went. 149. 6 Id. 403. 428. *The premises must be described with the same certainty as in a declaration of ejectment*, (see Arch. Pl. [174] and Ev. p. 465.,) *on account of the restitution which follows *conviction. If the estate J. N. had in the premises, were not a fee simple, but an estate in tail, or for life merely, describe it as such.* See Arch. Pl. & Ev. p. 119.

Imprisonment, and ransom at the King's will. 5 R. 2. c. 8.

Evidence.

The prosecutor must prove: *first*, that he was seised in fee of the premises in question, at the time of the forcible entry; and proof that he was in the actual occupation of the premises, or in the perception of the rents and profits, is sufficient *primâ facie* evidence of his seisin. See Jayne *v.* Price, 5 Taunt. 326, 1 Marsh, 68. This presumption, however, may be rebutted, either by direct evidence of his having a less estate, or by evidence of circumstances from which the jury may presume it. Vide Id. But it is immaterial whether the estate thus proved, be an estate by right or by wrong; for even if the defendant have a right of entry, still his asserting that right "with strong hand or with multitude of people," is equally an offence within the statute, as if he had no right. The statute, however, does not extend to a case where the party ousted had the bare custody of the premises for the defendant; 1 Hawk. c. 64. s. 32; but it extends to the forcible ouster of one joint tenant, or tenant in common, by another. Id. s. 33. It may be considered a good general rule, also, that the statute extends to all hereditaments, to which the defendant, if he had a right, might have asserted that right by a peaceable entry.

Secondly, the prosecutor must prove the forcible entry. An entry "with strong hand," or "with multitude of people," is the offence described in the statute. Therefore an entry by breaking the doors or windows, &c., whether any person be in the house or not, especially if it be a dwell-

ing house, is a forcible entry within the statute. See 1 Hawk. c. 64. s. 26. So, an entry, where personal violence is done to the prosecutor, or to any of his family or servants, or to any person or persons keeping the possession for him, Vide Id. s. 26, or even where it is accompanied with such threats of personal violence, (either actual, or to be implied from the actions of the defendant, or from his being unusually armed or attended, or the like) as were likely to intimidate the prosecutor or his family, &c., and to deter them from defending their possession, vide Id. s. 27, 20, 21, is a forcible entry within the statute. But an entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out and then shutting the door upon him, or the like, without further violence, Com. Dig. Forc. Ent. A. 3. 1 Hawk. c. 64. s. 26, or if effected by threats to destroy the owner's goods or cattle, *merely, and not by threats of personal violence, 1 Hawk. c. 64. s. 28, is not deemed a forcible entry. If, however, whilst the owner is out of his house, the defendant forcibly withhold him from returning to it, and in the mean time send persons to take possession of it peaceably; this is said to be a forcible entry. Id. s. 26. Also, where a party having right, and whose entry is congeable, enters or makes claim, and the other party afterwards continues to hold possession by force; this is considered a forcible *entry* in the party so holding; because his estate is defeated by the entry or claim, and his continuance in possession is deemed a new entry. Id. s. 22. 34. Co. Lit. 25.

[175]

Where the party entering has in fact no right of entry, all persons in his company, as well those who do not use violence as those who do, are equally guilty; but if he have a right of entry, then those only who use or threaten violence, 3 Bac. Abr. Forc. Ent. B, or who actually abet those who do, are guilty.

Thirdly, as to the expulsion: it is necessary to prove the expulsion, and that the prosecutor is still kept out of possession, merely for the purpose of obtaining restitution of the premises; 1 Hawk. c. 64. s. 41; but it is no part of the offence described by the statute, which mentions a forcible entry merely. And it may be necessary here to observe, that no restitution shall be awarded, if the defendant have been permitted to remain quietly in possession for three years previously to the finding of the indictment. 31 El. c. 11.

Indictment for a forcible entry into a leasehold, &c. on stat. 21. *J.* 1. *c.* 15.

This may be the same as the last precedent, with such alterations only as are necessary to adapt it to a term for years, tenancy by copy of court roll, or tenancy by elegit, statute merchant, and staple. As thus: that J. N., late of, &c. &c., was possessed of a certain messuage with the appurtenances, there situate and being, for a certain term of years, whereof divers, to wit, ten years, were then to come, and are still unexpired; and the said J. N. being so possessed thereof, &c. &c. *as in the last precedent. The evidence is the same as in the last case, except merely in the proof of the estate the prosecutor had in the premises.*

Indictment for a forcible detainer, on stat. 8 *H.* 6. *c.* 9. *or* 21 *J.* 1. *c.* 15.

The same as in the last two precedents respectively, to the end of the statement of the seisin or possession: then proceed thus:] and the said J. N., being so seised [*or* possessed] thereof, J. S., late of the parish aforesaid,

in the county aforesaid, labourer, *afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, into the said messuage with the appurtenances aforesaid, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage with the appurtenances aforesaid, then and there unlawfully did expel and put out; and the said J. N., from the possession thereof so as aforesaid being unlawfully expelled and put out, the said J. S. from the said third day of May, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage with the appurtenances aforesaid, with force and arms, and with strong hand, unlawfully and injuriously then and there did keep out, and the said messuage with the appurtenances and the possession thereof then and there unlawfully and forcibly did hold, and still doth hold from the said J. N.: to the great damage of the said J. N., against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Evidence.

Prove the seisin or possession, as in the two former cases. Prove an entry; whether peaceable or not, is immaterial. Proof of the expulsion, which *ex vi termini* implies force, is not material, as the gist of the offence, is the forcible detainer merely. Holding the premises from the prosecutor by force, however, must be proved; and the same violence or terror which will make an entry forcible, will also make a detainer forcible. 1 Hawk. c. 64. s. 30. 1 Russel, 417. But merely refusing to go out of the house; 1 Hawk. c. 64. s. 30; or a tenant at will denying possession to his lessor; or a man keeping out of his land, by force, a person claiming common upon it; Com. Dig. Forc. Det. B. 2: is not a forcible holding, within the meaning of the statutes.

It seems that a three months quiet possession of the messuage, &c. by the defendant, before indictment found, is a good defence to a prosecution for a forcible detainer merely. See 8 H. 6. c. 9. s. 7.

Indictment for a forcible entry and detainer at common law.

Middlesex, to wit: The jurors for our lord the King, upon their oath, present that J. S., late of the parish of B., in the county of M., gentleman, K. T. of the same parish, carpenter, and L. W. of the same parish labourer, together with divers other persons, to the number of six or more, to the jurors aforesaid unknown, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, to wit, with pistols, swords, sticks, staves, and
[177] other offensive weapons, at the parish aforesaid, *in the county aforesaid, into a certain barn, and a certain orchard there situate and being, and then and there in the possession of one J. N., unlawfully, violently, forcibly, injuriously, and with a strong hand did enter; and the said J. S., K. T., and L. W., together with the said other evil disposed persons, to the jurors aforesaid unknown, as aforesaid, then and there, with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons, unlawfully, violently, forcibly, injuriously, and with a strong hand, the said J. N. from the possession of the said barn and orchard did expel, amove, and put out; and the said J. N., so as aforesaid, expelled, amoved and put out from the possession of the said barn and orchard, then and there with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons, unlawfully, violently, forcibly,

injuriously, and with a strong hand, did keep out, and still do keep out; and other wrongs to the said J. N. then and there did: to the great damage of the said J. N., and against the peace of our lord the King, his crown and dignity. *There is no doubt an indictment will lie at common law, for a forcible entry; although it is generally brought on the acts of parliament.* Per Wilmot, J. in R. *v.* Bake, 3 Bur. 1731.

This is a misdemeanor at common law.

Evidence.

The evidence of the forcible entry, upon this indictment, must be stronger than is required to support an indictment on the statutes; that is to say, there must be proof of such a force as constitutes a public breach of the peace. R. *v.* Wilson, 8 T. R. 357, and see R. *v.* Bake et al. 3 Bur. 1731.

It is not necessary to set forth or prove the particulars of the prosecutor's estate in the messuage, &c., because in this case there is no restitution; stating that J. N. was possessed, and proving his possession, will be sufficient. R. *v.* Wilson, 8 T. R. 357. For the same reason, it does not seem to be necessary to prove the expulsion or detainer, unless where the prosecutor has failed to prove the entry to have been forcible. See ante, p. 175.

SECT. 5.

ARSON.

Indictment for Burning the House of another.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B. in the *county of [178] M., labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, wilfully, and maliciously, did set fire to and burn a certain dwelling house of one J. N., there situate: against the peace of our said lord the King, his crown and dignity. *If the house were not a dwelling house, but merely a stable, barn, or other outhouse, which was parcel of the dwelling house, you may describe it accordingly: or perhaps a description of it, as the dwelling house, may be sufficient, as in the case of burglary. This count is for arson at common law; it may be advisable to add to it the following count, upon stat.* 9 G. 1. c. 22. s. 1: and the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, maliciously, and feloniously, did set fire to a certain other house of the said J. N., there situate: against the form of the statute in such case made and provided, and against the peace of our said lord the King, his crown and dignity. *The offence described in stat.* 9 G. 1. c. 22. s. 1, *is the setting fire to "any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood."*

Felony, death. 4 & 5 Ph. & M. c. 4. (see 11 Co. 35. 2 Hale, 346, 347. Fost. 336.) 9 G. 1. c. 22. s. 1.

Evidence.

On the third day of May, &c.] The time here stated need not be proved as laid: if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment, it is sufficient. Ante, p. 14. 60. Where the indictment alleged the offence to have been committed in the night time, and it was proved to have been committed in the day time, the judges held the variance to be immaterial. R. *v.* Minton, 2 East, P. C. 1021. see ante, p. 67.

The parish however is material, even in a count on stat. 9 G. 1. c. 22, (although we have seen, ante, p. 3, that the venue in indictments for offences described in that act may be laid in any county,) for the parish is part of the local description of the house burnt, and referred to by the subsequent words, "there situate." See ante, p. 14, 15. 62. Therefore, if the house be proved to be situate in another parish, the defendant must be acquitted.

Feloniously, wilfully, and maliciously.] The burning must have
[179] been done wilfully and maliciously, to be an offence, *either at common law, or within the stat. 9 G. 1. c. 22. s. 1; and therefore no negligence or mischance amounts to it. 4 Bl. Com. 222. 3 Inst. 67. For which reason, though an unqualified person, by shooting with a gun, happen to set fire to the thatch of a house, this lord Hale determines not to be felony, contrary to the opinion of former writers. 1 Hale, 569. But if a man, intending to commit a felony, by accident set fire to another's house, this it should seem would be arson at common law, and also within the statute. See Fost. 258, 259. If, intending to set fire to the house of A., he accidentally set fire to that of B., it is felony. 1 Hale, 569. Even if a man, by wilfully setting fire to his own house, burn also the house of one of his neighbours, it will be felony; See R. *v.* Probert, 2 East, P. C. 1031. R. *v.* Isaac, Ibid; for the law in such a case implies malice, particularly if the party's house were so situate, that the probable consequence of its taking fire was, that the fire would communicate to the houses in its neighbourhood.

Set fire to, and burn.] The words in stat. 9 G. 1. c. 22. are, "set fire to," merely. But within this act, as well as to constitute the offence of arson at common law, it seems there must be an actual burning of some part of the house; a bare intent, or attempt to do it, is not sufficient. Where, upon an indictment on this statute for setting fire to a paper mill, it appeared that the defendant set fire to some paper that was drying in one of the lofts, but that no part of the mill itself was burnt: the judges held that it did not amount to an offence within the act. R. *v.* Taylor, 1 Leach, 49. But the burning and consuming of any part of the house, however trifling, is sufficient, although the fire be afterwards extinguished. 1 Hawk. c. 39. s. 17. 3 Inst. 66. 1 Hale, 569.

It is seldom that a wilful burning by the defendant can be proved by direct proof: the jury in general have to presume the defendant's guilt, from circumstantial evidence. See ante, p. 77, 78. Where a house was robbed and burnt,—the defendant's being found in possession of some of the goods, which were in the house at the time it was burnt, was admitted as evidence tending to prove him guilty of the arson. R. *v.* Rickman, 2 East, 1035.

A certain dwelling house.] Arson at common law extended to the burning not only of dwelling houses, but of all outhouses, parcel thereof, such as barns, stables, &c., though not contiguous thereto, nor under the same roof. 1 Hale, 567. The stat. 9 G. 1. c. 22, extends to the burning of any house, barn, or outhouse. Upon an indictment for burning a dwelling house, either at common law or under the statute, it would perhaps be sufficient to prove a burning of an outhouse, parcel *of the dwelling house, and within the same curtilage, as in burglary; see ante, p. 165; where such an outhouse was burnt, [180] and an indictment on the stat. 9 G. 1. c. 22, described it as a "certain outhouse," an objection that the offence should have been described as a burning of the dwelling **house**, (the word "outhouse" in the statute meaning, as it was suggested, an outhouse which is not parcel of a dwelling house), was overruled by the judges. R. *v.* North, 2 East, P. C. 1021. So, where the indictment described the house, in some of the counts as "a certain outhouse," in others as "a certain house," and the evidence was of a burning of a school-room, separated from the dwelling house by a small passage, but the roof of one extending over the roof of the other: the judges are understood to have holden, that the evidence satisfied the description in both sets of counts. R. *v.* Winter, 2 Russel, 1673. So, where the indictment charged the burning of "a certain house" of the corporation of Liverpool, and the proof was of a burning of a jail belonging to the corporation, the judges held it to be sufficient. R. *v.* Donnevan, 2 W. Bl. 682.

The house also must be laid and proved to be the house of another: see 1 Hale, 566: for a tenant in possession of a house, under a lease for years, R. *v.* Holmes, Cro. Car. 376, or even under an agreement for a lease, R. *v.* Breeme, 1 Leach, 220, or a mortgagor in possession of a copyhold house which he had before surrendered to the use of the mortgagee, R. *v.* Spalding, 1 Leach, 218, or the like, cannot be guilty of arson, either at common law or under stat. 9 G. 1. c. 22, by burning the house of which he is in possession. But where a pauper wilfully set fire to a house, into which he had been put by the overseers, and for which he paid no rent: this was holden to be arson. R. *v.* Gowen, 2 East, P. C. 1027. So, if a landlord or reversioner set fire to the house of the tenant, it is arson. Fost. 115. 113. So, if a man set fire to his own house, and thereby burn the house of his neighbour, it is arson. Ante, p. 179. The house also must be proved to be the house of J. N., in the same manner as in burglary. See ante, p. 165—169. see R. *v.* Glanfield, 2 East, P. C. 1034. Where a parish pauper set fire to a house in which he was put to reside by the overseers, and it was not known who the trustees were in whom the legal ownership was vested, it was holden that it might be described as the house of the overseers, or of persons unknown. R. *v.* Rickman, 2 East, P. C. 1034.

Indictment for setting fire to mills, &c.

An indictment on stat. 9 G. 3. c. 29. s. 2. *for setting fire to a mill, may be in the same form as the last precedent, except as to the description of the building burnt, namely, a* "wind saw mill or *other [181] windmill, or water mill, or other mill." *And the same, as to setting fire to any* "cock, mow, or stack of corn, straw, hay, or wood." 9 G. 1. c. 22, s. 1. See R. *v.* Judd, 2 T. R. 255. *The same, also, as to setting on fire, or burning, any* "wood, underwood or coppice," 1 G. 1. st. 2. c. 48. s. 4, *or any* "mine, pit, or delph of coal, or cannel coal." 10 G. 2.

c. 32. s. 6, *or any* "wain or cart laden with coals or any other goods or merchandise," 37 H. 8. c. 6. s. 4, *or* "any of his Majesty's vessels of war in his Majesty's dock yards, or any private yards, or any timber there placed for building or repairing the same, or any military, naval, or victualling stores, or other ammunitions of war, or any place where the same shall be kept," 12 G. 3. c. 24. s. 1, *or* "any ship, keel, or other vessel," 33 G. 3. c. 67. s. 5, *or* "any buildings, erections, or engines, used or employed in carrying on, or conducting, any branch of a trade or manufactory of goods, wares, or merchandise of any description whatsoever, or in which any goods, wares, or merchandise shall be warehoused or deposited." 52 G. 3. c. 130. s. 1.

Indictment for burning the party's own house.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S. late of the parish of B., in the county of M., grocer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, wilfully, maliciously, and unlawfully did set fire to a certain house, there situate, then being in the possession of him the said J. S., with intent thereby to injure and defraud [the "London Insurance of houses and goods from fire, then being a body corporate:" *or* "J. N., K. O. & L. P., then being subjects of his said Majesty"]: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *If there be any doubt as to the persons intended to be defrauded, or as to the persons in whose possession the house was at the time (for the statute extends as well to cases where the house was in the possession of any other person, as of the defendant,) it may be stated in a different manner in different counts.*

Felony, death. 43 G. 3. c. 58. s. 1. *This statute extends to a "house, barn, granary, hop-oast, malthouse, stable, coachhouse, outhouse, mill, warehouse, or shop;" and it is extended, by stat.* 52 G. 3. c. 130. s. 1, *to buildings, erections, or engines, used or employed in carrying on, or conducting any branch of a trade, or manufactory of goods, wares, or merchandise of any description whatsoever, or in which any goods, wares, or merchandise shall be warehoused or deposited.*"

[182] **Evidence.*

The offence is proved as arson in ordinary cases, (see ante, p. 178,) excepting that in addition to it, it must be proved that the offence was committed with intent to injure or defraud the person or corporation mentioned in the indictment. Where, upon an indictment for setting fire to a mill, with intent to injure and defraud the owners, the witnesses for the prosecution admitted that the defendant was a harmless, inoffensive man, and that they were not aware of any motive he could have had in committing the act in question: the jury however having found him guilty, the judges held the conviction to be right; for burning the mill must necessarily have been done with intent to injure. R. *v.* Farrington, 2 Russel, 1675.

SECT. 6.

MALICIOUS MISCHIEF.

Indictment for Killing a Horse, &c.

Commencement, as ante, p. 113.] One black gelding of the price of ten pounds, of the goods and chattles of one J. N., in a certain field belonging to him the said J. N. [*or* to one K. O.] there situate, then and there being, feloniously, unlawfully, and maliciously then and there did kill: To the great damage of the said J. N., against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *The venue may be laid in any county.* See ante, p. 3.

Felony, death. 9 G. 1. c. 22. s. 1. *"Cattle" is the word used in the act; and this has been holden to include horses, as well as oxen, &c.* R. *v.* Paty, 2 W. Bl. 721. *See ante, p.* 128, *as to killing sheep or cattle, with intent to steal part of the carcasses.*

Evidence.

That the defendant killed the horse, may be proved either by direct evidence, or by the proof of facts from which the jury may fairly presume it. See ante, p. 77, 78. Also prove that the horse was the property of J. N. A variance between the indictment and evidence, as to the ownership of the field, will not be material.

Secondly, prove the offence to have been committed maliciously, that is, out of malice to the owner of the horse. This may be proved either by direct evidence, or the malice may be presumed from the facts of the case; indeed the very act of wilfully killing another man's cattle (not being with the *intent of stealing any part of the car- [183] cass, &c.) if unexplained, raises of itself a strong presumption of malice to the owner. But this, like all other presumptions, may be rebutted by evidence of the real motive: and therefore, where it appeared that the act of the defendant proceeded from malice or anger towards the animal, and not from any malice or motive of revenge towards the owner, it was holden not to be within the act. R *v.* Pearce. 1 Leach, 527. R. *v.* Shepherd, 1 Leach, 539, and see 2 East, P. C. 1073. But where the defendant killed a horse, in order to prevent it from running a particular race, it was holden to be within the statute, and the defendant was convicted. R. *v.* Dobbs, 2 East, P. C. 513.

Indictment for Wounding a Horse, &c.

The same as the last precedent, except that for the word "kill," *you substitute the words* "maim and wound."

Felony, death. 9 G. 1. c. 22. s. 1. *The words in the statute are "kill, maim, or wound any cattle."*

Evidence.

Prove a maiming or wounding of the animal, from a malice to the owner, as directed under the last precedent. Where the wounding proved was, the driving of a nail into the frog of a horse's foot, but it appeared that the horse was likely to recover; it was objected that no wounding was

within the meaning of the act, that was not productive of permanent injury to the animal: but the judges overruled the objection, holding that the word "*wound*" was used by the legislature in this act, as contradistinguished from maiming, which is a permanent injury. R. v. Haywood, 2 East, P. C. 1076.

Indictment for Destroying Trees.

Commencement, as ante, p. 113.] Two elm trees, the property of one J. N., then and there planted in a certain avenue to the dwelling house of the said J. N., and then growing for ornament there, then and there feloniously, unlawfully, and maliciously did cut down and destroy: To the great damage of the said J. N., against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *If there be any doubt as to the ownership of the trees, vary the statement of it in different counts.*

Felony, death. 9 G. 1. c. 22. *The statute extends to all "trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit." By stat.* 6 G. 3. c. 36. *to "lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy or carry away, in the night time, any oak, beech, ash, elm, fir,* [184] *chestnut, or asp timber tree, or other tree standing for timber, or likely to become timber," is made felony, punishable with transportation for seven years. See ante, p.* 129. *an indictment on this statute, for stealing a timber tree; and an indictment for destroying, &c. such a timber tree, may readily be framed from it; by substituting for the words "steal, take, and carry away," such of the words above mentioned, such as "lop, top, cut down, &c., as may be descriptive of the offence.*

Evidence.

Prove that the defendant "cut down, or otherwise destroyed" (these are the words in the statute) one or more of the trees mentioned in the indictment, a variance in the number not being material. Prove that the trees, at the time, were growing in an avenue, as stated in the indictment (or in a garden, orchard, or plantation, if so stated,) and that they were intended for ornament (or for shelter or profit, if so stated;) and prove them to be the property of J. N.

Prove also that the trees were cut down or destroyed, from malice to the owner of them, in the same manner as you would prove malice on an indictment for killing or wounding cattle, upon the same statute. See ante, p. 182. Upon an indictment on 6 G. 3. c. 36, on the contrary, such evidence of malice is not necessary; but the offence must be proved to have been committed in the night time. See ante, p. 129.

Indictment for breaking down the head of a fish pond.

Commencement, as ante, p. 113.] The head and mound of a certain fish pond, in a certain orchard belonging to one J. N. there situate and being, then and there feloniously, unlawfully, and maliciously did break down, whereby the fish in the said pond then and there being, were lost and destroyed: to the great damage of the said J. N., against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 9 G. 1. c. 22.

Evidence.

Prove that the defendant broke down the head or mound of the fish pond described in the indictment. And it may be necessary to mention, that it is not essential to this offence that the pond should be situate in a park, garden, orchard, &c., as is the case with respect to stealing fish, within stat. 5 G. 3. c. 14. s. 1, (see ante, p. 134,) the words in stat. 9 G. 1. c. 22, being "any fish pond," generally; but any local description given of it in the indictment, must, it should seem, be proved as laid. See ante, p. 62. 14, 15.

The offence must be proved to have been committed from malice to the owner of the pond, in the same manner as under *the [185] last precedent, and ante, p. 182. Therefore, where it appeared that the defendant had broke down the mound of a fish pond, in order to *steal* the fish, the judges held that it was not an offence within the statute. R. *v.* Ross, 2 East, P. C. 1067.

Indictment for cutting down river or sea banks.

Commencement, as ante, p. 113.] The bank of a certain river, to wit, of the river ———, there situate and being, then and there feloniously, unlawfully, and maliciously did break down, and cut down, whereby certain lands, to wit, the lands of one J. N., were overflowed and damaged: to the great damage of the said J. N., against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 6 G. 2. c. 37. c. 5. *The statute extends to the "bank or banks of any river, or any sea bank."* See also, 10 G. 2. c. 22. s. 5. 4 G. 3. c. 12. s. 5.

Evidence.

Prove that the defendant broke or cut down the banks of the rivers, as stated in the indictment, and that the lands of J. N., were thereby overflowed or damaged. Prove also that the offence was committed maliciously, in the same manner as you would an offence under stat. 9 G. 1. c. 21, (see ante, p. 182;) indeed the act charged in the indictment is of itself (if proved) quite sufficient to raise a presumption of malice, as it is very unlikely to have proceeded from any other motive. If it were done out of mere wantonness, it would be (it should seem) within the act.

Indictment for destroying the fences of inclosed lands.

Commencement, as ante, p. 113.] Feloniously, wilfully, and maliciously did pull down, damage, demolish, and destroy [*or* did set fire to, and burn] a certain fence, to wit, a quickset hedge, then before erected, set up, provided, and made, for dividing and inclosing a certain common and waste land, to wit, a certain common and waste land called ———, there situate, in pursuance of a certain act of parliament intituled [*&c. Here insert the title of the inclosure act, in pursuance of which the common was inclosed:*] against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, transportation for seven years. 9. G. 3. c. 29. s. 3.

**Evidence.*

Give such evidence as may be necessary to prove that the fence in question was made in pursuance of the act of parliament mentioned in the indictment; and prove that it was pulled down, damaged, or destroyed by the defendant.

Indictment for destroying woollen goods in the loom, &c.

Commencement, as ante, p. 113.] With force and arms, the house of one J. N. there situate, then and there feloniously and with force did break and enter, with intent feloniously, wilfully, and maliciously to cut and destroy a certain quantity of woollen serge, in a certain loom used in the making thereof, belonging to him the said J. N., in the said house then and there being: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*2d count.*) And the jurors aforesaid upon their oath aforesaid do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, twenty yards of woollen serge, of the value of four pounds, of the goods and chattels of the said J. N., in a certain loom used in the making of woollen serge belonging to him the said J. N., in the said house of him the said J. N. then and there being, then and there feloniously, wilfully, and without the consent of the said J. N., did cut and destroy: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 22 G. 3. c. 40. s. 1. *The statute extends to "serge or other woollen goods," and also to the breaking or destroying of any tools used in the making of such woollen goods.* See stat. 4 G. 3. c. 37. s. 16, *as to linen and linen yarn;* stat. 22 G. 3. c. 40. s. 3, *as to linen and cotton, or linen and cotton mixed with other materials;* stat. 22 G. 3. c. 40. s. 2, *as to velvet, wrought silk, or silk mixed with other materials, or other silk manufacture;* stat. 28 G. 3. c. 55. s. 4. and 57 G. 3. c. 126. s. 2, *as to stocking and lace frames, and the web or lace therein: which are all similar to the above statute of* 22 G. 3. c. 40. s. 1, *and indictments may easily be framed on them from the above precedent.*

Evidence.

Prove either that the defendant broke and entered the house, or prove at least that he entered the house with force; and prove, from circumstances, the defendant's intent in doing so, as stated in the indictment.

In support of the second count you must prove that the
[187] *defendant cut or destroyed the serge whilst in the loom, in a house of J. N., as described in the indictment; also that this was done without the consent of J. N.; and that the serge was J. N.'s property.

Indictment for destroying a ship, to defraud the underwriters.

Admiralty of England: The jurors for our lord the King upon their oath present, that before the committing of the felony herein after mentioned, to wit, on [*the date of the policy*] at London, to wit, in the parish of Saint Michael Bassishaw, in the ward of Bassishaw, certain goods in and on board of a certain ship called the ———, were then and there insured

by certain underwriters, to wit, by A. B. C. D. E. F., and G. H., and the said underwriters then and there severally underwrote a certain policy of insurance upon the said goods, so as aforesaid loaden on board the said ship, for a voyage from the port of London to the island of Saint Vincent in the West Indies: And that J. S. late of the parish aforesaid, in the county aforesaid, mariner, and K. T. of the same place, mariner, well knowing the premises, but intending and fraudulently and feloniously contriving wilfully and maliciously to defraud and prejudice the said several persons who had so underwritten the said policy as aforesaid, afterwards, and whilst the said policy of insurance was in force, to wit, on the third day of May, in the year last aforesaid, with force and arms, on board the said ship, upon the high sea, and within the jurisdiction of the Admiralty of England, the said ship feloniously, wilfully, and maliciously did cast away and destroy, with intent and design thereby wilfully and maliciously to prejudice the said several persons who had so underwritten the said policy of insurance upon the said goods so loaden on board the said ship, as aforesaid: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *You may add another count, stating, after the words* "cast away and destroy," *the means by which it was effected, as, by cutting holes in the bottom, or the like. This does not seem to be necessary; but it may be prudent to add it. Also, if the intent, with which the offence was committed, be doubtful, you may add counts charging the offence to have been done with intent to prejudice the underwriters on the ship, or the underwriters on the freight, or the owners of the ship or goods, as may appear necessary.*

Felony, death. 43 G. 3. c. 113. *The words in the statute are,* "*cast away, burn, or otherwise destroy any ship or vessel.*" See 33 G. 3. c. 67. s. 5, *which makes it felony in a seaman wilfully and maliciously to destroy or damage a ship, keel, or other vessel, otherwise than by fire; and see ante p.* 181, *as to destroying ships by fire.*

**Evidence.* [188]

Prove the policy, and that the ship sailed upon her pretended voyage. Prove that the defendants cast away or otherwise destroyed the vessel. If the ship had only run aground, and were afterwards got off in a condition so as to be easily refitted, it seems it would not be an offence within the act. See R. *v.* De Londo, 2 East, P. C. 1098.

You must also prove the offence to have been committed with the intent alleged in the indictment. Proving that it was done wilfully, is of itself sufficient evidence from which the jury may presume that it was committed with intent to prejudice either the owner of the ship, the owners of the goods, or the underwriters; and if you add to this, proof that goods to a large amount were insured, and goods of a comparatively trifling value were actually put on board, or that the goods, or some of them, were relanded after the vessel sailed, or the like, it will be sufficient to raise a violent presumption that the intent was to defraud the underwriters.

Sect. 7.

FORGERY.

There are several points decided upon the various statutes relating to forgery, which apply equally to all cases of forgery; and the only method, that suggested itself, of laying the substance of them before the reader, in the most simplified form, was, by giving a blank precedent of an indictment for forgery and for knowingly uttering a forged instrument, upon which might be grafted all the observations applicable to pleading and evidence in forgery generally; reserving for the remaining precedents in this section the points more immediately applicable to each particular case.

Indictment for forgery generally.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting a
[189] certain [*here name the *instrument;*] which said false, forged, and counterfeited —— is as follows, that is to say: [*here set out the instrument verbatim.* See ante, p. 19, 20, 64, 65;] with intention to defraud one J. N.: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*2d count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did utter and publish as true, a certain other false, forged, and counterfeited ——; which said last mentioned false, forged, and counterfeited —— is as follows; that is to say: [*here set out the instrument verbatim;*] with intention to defraud the said J N., (he the said J. S., at the time he so uttered and published the said last mentioned false, forged, and counterfeited ——, as aforesaid, then and there well knowing the same to be false, forged, and counterfeited:) against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

This is not intended as a general precedent, to serve in all cases of forgery; because the form in each particular case, must depend upon the statute, on which the indictment is framed. But with the assistance of it, and upon an attentive consideration of the operative words in the statute creating the forgery, the pleader can find no difficulty in framing an indictment, in any case not particularly mentioned hereafter in this section.

The forgery should, in prudence, be alleged in the words of the statute on which the indictment is framed. But if the forgery consist of the alteration of a true instrument, the alteration may either be specially alleged (and this mode is advisable, at least in one set of counts) even where the word "alter" is not in the statute. R. *v.* Elsworth, 2 East, P. C. 986, 988, or the alteration may be given in evidence under, and will support, a count charging the forgery of the entire instrument. Vide post, in the evidence.

Care must be taken to set out the forged instrument, in words and figures, correctly; the slightest variance will be fatal, and will entitle the defendant to an acquittal. See ante p. 19, 20, 64. Where the indictment, in setting out the forged instrument, also set out the attestation at the foot of it, as part of the instrument; but it appeared in evidence, that when the defendant subscribed the instrument, the attestation was

not written on it: it was holden nevertheless to be no variance. R. *v.* Dunn, 2 East, P. C. 976. Where the forged instrument is actually within the meaning of the statute on which you intended framing your indictment, but does not sufficiently appear to be so on the face of it, you must not only set out a literal copy of it in the indictment, but you must also add such averments of extrinsic facts as may be necessary to make it appear upon the face of the record, that *the forged instrument [190] is one of those intended by, and described in, the statute. Thus, for instance, where by the usage of a public office, the bare signature of a party upon a navy bill operated as a receipt, an indictment for forging such a receipt, setting forth the navy bill and indorsement, and charging the defendant with having forged "a certain receipt for money, to wit, the sum of 25*l.* mentioned and contained in the said paper, called a navy bill, which forged receipt was as follows, that is to say:—" William Thornton, William Hunter."—was holden bad, because it did not shew by proper averments that these signatures imported a receipt. R. *v.* Hunter, 2 Leach, 624, 2 East, P. C. 928. In like manner it was holden, that an indictment for forging the word "settled" at the bottom of a bill, must shew by proper averments that it is a receipt. R. *v.* Thompson, 2 Leach, 910, and see ante, p. 24. But where, upon an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment stated the receipt thus, "8 March, 1773. Received the contents above by me, Stephen Withers," without setting out the account at the foot of which it was written, it was holden sufficient. R. *v.* Testick, 1 East, 181 n. and see ante, p. 20.

The intent to defraud, is described as an ingredient of the offence, in all the statutes upon the subject of forgery; and must consequently be charged in the indictment. Where the intent mentioned in the statute, is, to defraud any particular corporation, &c., it must of course be so laid in the indictment. But where the intent is described generally, to defraud any person or persons, it is prudent in the indictment, to charge the offence, in different counts, to have been committed with intent to defraud each of the persons, partnerships, or corporations, that might have been defrauded by it if the forgery had succeeded; as, for instance, if the names of drawer, acceptor, and indorser to a bill of exchange be forged, the indictment may charge it, in different sets of counts, to have been forged and uttered with intent to defraud the drawer, acceptor, indorser, and person to whom it was uttered, respectively.

As to the second count, for knowingly uttering the forged instrument, it is usual and prudent to add it in every case, lest the prosecutor should fail in proof of the actual forgery. But the forgery is of itself an offence, although the forged instrument have never been uttered. See R. *v.* Elliot, 1 Leach, 173; and see 2 Id. 987.

Some other points relating to the indictment, will be seen under the following head of evidence.

Evidence.

Falsely make, forge, and counterfeit, &c.] Proof of the altering of a part of a genuine instrument, will support an *indictment [191] charging the defendant with having forged and counterfeited the instrument itself. As, for instance, where the indictment charged the defendant with having made, forged, and counterfeited a bill of exchange, the judges held that evidence of his having altered the bill, which was originally for 10*l.*, so as to make it appear to be a bill for 50*l.*, supported the indictment; even although the statute, on which the indictment was framed, contained the word "alter," as well as the word "forge." R. *v.* Teague, 2 East, P. C. 979. It is more usual, however, and perhaps more prudent, at least in one set of counts, to charge it as an alteration merely, and to allege the alteration specially. But there is no doubt that any, the slightest alteration, of a genuine instrument, in a material part, whereby a new operation is given to it, is a forgery; as, for instance, making a lease of the manor of *Dale*, appear to be a lease of the manor of *Sale*, by changing the D. to S.; 1 Hawk. c. 70. s. 2; making a bill of exchange for 8*l.*, appears to be for 80*l.*, by adding a cypher to the 8; R, *v.* Elsworth, 2 East, P. C. 986, 988; even altering the notes of a country banker, as to the place at which they were made payable in London, has been holden to be forgery. R. *v.* Treble, 2 Taunt. 328.

But where the forgery is of a mere addition to the instrument, and which has not the effect of altering it, but is merely collateral to it, as, for instance, a forged acceptance or indorsement to a genuine bill of exchange: proof of the forgery of the addition will not support an indictment charging the forgery of the entire instrument; the forgery of such addition must be specially alleged, and must be proved as laid. Forging the signature of the drawer to a bill of exchange, however, is the same precisely as forging the entire bill, and may be laid as such. Where an illiterate woman of the name of Dunn, represented herself to the prosecutor as the widow of a deceased seaman of the name of Wallace, and obtained from him a loan of money upon her promissory note; the note was written by the prosecutor, and upon his asking her what name he should put to it, she answered, Mary Wallace; he thereupon subscribed the name "Mary Wallace" to the note; and she affixed her mark in the usual place, between the christian and surname: the judges held this to be a forgery of the note. R. *v.* Dunn, 1 Leach, 57. And whether the name forged be that of a merely fictitious person, who never existed, or a person actually existing, is wholly immaterial; it is as much a forgery in the one case as in the other. R. *v.* Lewis, Fost. 116. R. *v.* Wilks, 2 East, P. C. 958. R. *v.* Bolland, Ibid. R. *v.* Lockett, 1 Leach, 94. R. *v.* Parkes et al. 2 Leach, 775, 2 East, P. C. 963. R. *v.* Froud, 1 Brod. & Bing. 300. R. *v.* Sheppard, 1 Leach, 226. R. *v.* Whiley, 2 Russel, 1437. R. *v.* Francis, Id. 1439.

[192] *Even where a man, upon obtaining discount of a bill, indorsed it in a fictitious name, when he might have obtained the money as readily by indorsing it in his own name, it was holden a forgery. R. *v.* Taft, 1 Leach, 172: and see R. *v.* Taylor, 1 Leach, 214. But if a man who has been long known by a fictitious name, draw a bill in that name, it will not be a forgery. See R. *v.* Aickles, 2 East, P. C. 968. Or if a man pass himself off as the indorser of a bill, when in fact he is not so, but the indorsement is genuine: this cannot be deemed forgery, even although it be done for purposes of fraud, and in concert with the real indorser. R. *v.* Hevey, 1 Leach, 229. But if a bill payable to J. S. or order, get into the hands of another person of the same name, and he indorse it, it will be forgery. Mead *v.* Young, 4 T. R. 28.

That the signature or other part of the instrument alleged to be forged, is not of the handwriting of the party, may be proved by any person acquainted with his handwriting, either by having seen him write, or by being in the habit of corresponding with him. Ante, p. 91. We have seen (ante, p. 96,) that the party himself, whose name is forged, cannot be a witness to prove the forgery, except in a few cases which are deemed exceptions to the general rule. But even in those cases in which he may be a witness, the forgery may notwithstanding be proved by other witnesses who are acquainted with his handwriting, without calling him as a witness; his testimony as to the fact of forgery, is not deemed the best evidence, and that of other persons merely secondary. R. *v.* Hughes, 2 East, P. C. 1002. R. *v.* M'Guire, Ibid. Evidence must also be given of the identity of the party whose handwriting is alleged to be forged; that is, it must be proved, expressly or from circumstances, that the alleged forgery was intended to represent the handwriting of the person, whose handwriting it is proved not to be; or that it was attempted to be uttered as the handwriting of a person who never existed. See ante, p. 191, and see R. *v.* Sponsonby, 2 East, P. C. 996, 997. R. *v.* Downs, 2 East, P. C. 997.

Which said false, &c. ——— is as follows, &c.] The instrument given in evidence, must correspond exactly with that set out in the indictment; the slightest variance will be fatal. Ante, p. 64. A mere literal variance, however, (that is, where the omission or addition of a letter does not alter or change a word so as to make it another word, 2 Salk. 661. Cowp. 229,) will not be material; as, for instance, "received" for "reiceved," R. *v.* Hart, 1 Leach, 145, 2 East, P. C. 977, "undertood" for "understood," R. *v.* Beach, Cowp. 229, or the like. Ante, p. 64.

The instrument must also appear, upon the face of it, to have been made to resemble a true instrument of the *denomination [193] mentioned in the indictment, and in the statute upon which it is framed, so as to be capable of deceiving persons using ordinary observation, see R. *v.* Collicott, 2 Leach, 1048. 4 Taunt. 300. R. *v.* Jones, 1 Leach, 204, although not perhaps those scientifically acquainted with such instruments. See R. *v.* Hoost, 2 East, P. C. 950. Even where, upon an indictment for forging a bank note, there appeared to be no water mark in the forged note, and the word "pounds" was omitted in the body of it: the defendant being convicted, the judges held the conviction to be right. R. *v.* Elliot, 1 Leach, 175. So, where the defendant was indicted for forging the will of *Peter* Perry, and the will produced in evidence commenced "I, *Peter* Perry," but was subscribed "*John* Perry, his mark;" but it was also stated in evidence, that upon this repugnancy being remarked to the prisoner, he said that he had by mistake written "*John*" instead of "*Peter*," and that the mark was that of Peter Perry: the defendant was convicted and executed. R. *v.* Fitzgerald et al. 1 Leach, 20. But if, on the other hand, the instrument do not appear to be such as probably might be imposed upon persons to whom it was likely to be uttered, as a true instrument of the denomination mentioned in the indictment, the defendant must be acquitted. Where the defendant was indicted for forging a will of lands, and the will produced was attested by two witnesses only: the judges held that the defendant could not be convicted, although it did not appear either in evidence or upon the face of the will, whether the lands were freehold or not; for they must be presumed to be freehold, unless the contrary appear. R. *v.* Wall, 2 East, P. C. 953. So, a bill of exchange for three guineas, not attested as required by stat. 17 G. 3. c. 30. s. 1, was holden by the judges not to be the subject of an indictment for forgery, as a bill of exchange; because, if it were a genuine instrument, it would be absolutely void for want of the attestation. R. *v.* Moffatt, 1 Leach, 431. But a man may be convicted of forging a will, although it appear in evidence, that the pretended testator is alive; R. *v.* Sterling, 1 Leach, 99. R. v. Coogan, Id. 499; for the instrument, if genuine, would be a will notwithstanding the testator were still alive; his death would merely give effect to the instrument. So, a man may be indicted for forging and uttering a bill of exchange, although the name of the payee was not indorsed on it, R. *v.* Wicks, 2 Russell, 1451, or even although the bill were not stamped, R. *v.* Hawkswood, 2 T. R. 606. 1 Leach, 257; ante, p. 92. R. *v.* Reculist, 2 Leach, 703. So, a man may be indicted for forging an instrument, which, if genuine, could not be made available, by reason of some circumstance, not appearing upon the face of the instrument, but to be made out by *extrinsic evidence, See R. *v.* M'Intosh, 2 Leach, 883. [194] 2 East, P. C. 842.

With intention to defraud J. N.] It is not necessary to prove that J. N. was actually defrauded by the forgery. R. *v.* Crooke, 2 Str. 901. R. *v.* Goate, 1 L. Raym. 737: if from circumstances the jury can presume

that it was the defendant's intention to defraud J. N., if in fact J. N. might have been defrauded if the forgery had succeeded, it is sufficient to satisfy this allegation in the indictment.

2d Count.

Utter and publish as true.] To utter and publish, mean nothing more than that the party tendered, or attempted to pass, or make use of the forged instrument, with the intent charged in the indictment; these words do not import that the person, to whom the forged instrument was tendered, actually accepted it with intent to retain it, or was defrauded by it. Accordingly we find that the legislature, wherever they intended that the offence should not be complete, without an acceptance on the one part and a relinquishment on the other, have described the offence in words of a different and appropriate meaning, such as "pay and put off," (See 1 East, P. C. 179,) or the like. In stat. 45 G. 3. c. 89. s. 1, (which is the act of most general importance upon the subject of forgery, extending to deeds, wills, bonds, bills of exchange, and promissory notes, warrants or orders for the payment of money or delivery of goods, acquittances and receipts for money or goods, and accountable receipts for notes, bills, or other securities for money,) the offence of uttering, &c. is described by the words "offer, dispose of, or put away," which include attempts to make use of a forged instrument, as well as cases where the defendant has actually succeeded in making use of it.

To maintain this count, also, the instrument must have been uttered as true, and not sold or disposed of as a forged instrument. Therefore where the legislature intended, by stat. 45 G. 3. c. 89, to prohibit not only the passing of forged bank notes as true ones, but also the selling of forged bank notes, they described the offence by the words "offer or dispose of, or put away," as to the vendor, (s. 2,) and by the words "purchase or receive," as to the buyer. s. 6. The first section also of the same statute, which we have seen (*vide supra*) extends to deeds, wills, bills of exchange, &c., describes the offence of uttering, &c. in the same words, "offer, dispose of, or put away."

A certain other false, &c.] This must be proved, as in the first count. See ante, p. 192.

[195] **With intention to defraud J. N.*] This is also proved, as in the first count. See ante, p. 194.

Well knowing the same to be false.] This is not capable of direct proof. It is, nearly in all cases, therefore, proved by evidence of facts from which the jury may presume it. Upon an indictment for disposing of, and putting away a forged bank note, knowing it to be forged, proof that the defendant has passed other forged notes, raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged; R. *v.* Wylie, 1 New Rep. 92. R. *v.* Tattersal, Id. 93 n. ante, p. 69. and see R. *v.* Ball, 1 Camp. 324; and if, in addition to this, it be proved that the defendant, when he passed the notes, gave a false name or address, it amounts to a violent presumption of his guilty knowledge. See ante, p. 78.

Indictment for Forging a Bond.

Commencement, as ante, p. 188.] A certain bond and writing obligatory, which said false, forged, and counterfeited bond and writing obligatory is as follows, that is to say: know all men [*&c. &c. so proceeding to set out*

the bond and condition verbatim, see ante, p. 189.] with intention to defraud the said J. N.: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*Second count.*) And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S., afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did utter and publish as true, a certain other false, forged, and counterfeited bond and writing obligatory, which said last mentioned false, forged, and counterfeited bond and writing obligatory is as follows, that is to say: know all men [*&c. &c. setting out the bond and condition verbatim*] with intention to defraud the said J. N., he the said J. S., at the time he so uttered and published the said last mentioned false, forged, and counterfeited bond and writing obligatory, as aforesaid, then and there well knowing the same to be false, forged, and counterfeited: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Add another count similar to the last, but stating that the defendant "did offer, dispose of, and put away a certain other false, forged, and counterfeited bond, and writing obligatory, &c. &c." *he the said J. S. at the time he so* "offered, disposed of, and put away" *the said last mentioned, &c. &c. well knowing &c. &c.: against the form, &c. The reason this count seems to me to be necessary, is this: The stat.* 2 G. 2. c. 25. s. 1, *made it felony, *death, to forge any deed, will, bond, bill of exchange, or promissory note, or acquittance or receipt for money or goods, or* "to utter or publish as true" *any forged deed, &c. The stat.* 45 G. 3. c. 89. s. 1, *reciting this and other acts, and stating that it was expedient that the several provisions in them should extend to every part of Great Britain,* "with the alterations and amendments therein, as are hereby made," *then proceeds to re-enact the clause in this act as to the forgery, and also that as to the uttering, except that for the words* "utter or publish as true," *it substitutes the words* "offer, dispose of, or put away." *Under these circumstances, although probably the offence of* "uttering and publishing as true" *may be deemed to be within the meaning of the words* "offer, dispose of, or put away," *made use of in the statute, yet until it is so decided, it may be prudent in all cases upon this statute to add a count in the words of the act, however seemingly inapplicable these words* "offer, dispose of, or put away," *may be to some of the instruments therein mentioned, such as deeds, wills, and receipts.*

[196]

* *Felony, death,* 45 G. 3. c. 89. s. 1.

Evidence.

Prove the forging and uttering, as directed ante, p. 190, &c. Under the third count, you may give in evidence a disposing of the bond as a forgery, or the making use of it, or attempt to make use of it, as a genuine instrument.

Indictment for Forging a Will.

Commencement, as ante, p. 188.] A certain will and testament, which said false, forged, and counterfeited will and testament, is as follows, that is to say: [here recite the will verbatim, including the attestation. See ante, p. 119.;] with intention to defraud one J. N.: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *Second count, that he* "did utter

and publish as true ;" *and third count, that he* " did offer, dispose of, and put away ;" *as in the last precedent. If it be a will of lands only, it should be charged to have been forged and uttered, &c. with intent to defraud the person who is heir at law: if of personal property only, the person who is next of kin to the deceased; if of real and personal property, the person who is heir at law, in one set of counts, and the next of kin in another. And in all these cases, it may be prudent to add another set of counts, charging the will to have been forged and uttered* " with intention to defraud such person and persons as would by law be entitled to the said several [lands, tenements, and hereditaments, goods, chattels, and effects] in the said pretended will mentioned as aforesaid." *In the other sets of counts, it is*
[197] *not necessary to *state that the person intended to be defrauded is heir at law or next of kin; for it is not necessary that it should appear upon the face of the indictment how he was to be defrauded; it is sufficient if that appear by the evidence.* See R. *v.* Elsworth, 2 East, P. C. 989. *You may, however, if you wish it, add other sets of counts, charging the offence to have been committed with intent to defraud the* "heir at law," *and the* "next of kin," *generally.*

Evidence.

Prove the forging and uttering, as directed ante, p. 190, &c. Prove also that J. N. is heir at law or next of kin to the deceased; but if you fail in this, you may nevertheless succeed upon some of the general counts.

Indictment for Forging a Bill of Exchange.

Commencement, as ante, p. 188.] A certain bill of exchange ; which said false, forged, and counterfeited bill of exchange is as follows, that is to say: 50*l.* Bristol, 25th March, 1822. Three months after date pay to [&c. &c. setting out the bill of exchange, in words and figures correctly,] with intention to defraud one J. N.: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. See ante, p. 188. *Second count*, that the defendant "did utter and publish as true" a certain other, &c. &c. ; *third count*, that the defendant "did offer, dispose of, and put away" a certain other, &c. &c. as in the precedent, ante, p. 195. *If the acceptance be also forged, add counts for it in this form:* And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, having in his custody and possession, a certain other bill of exchange, which said last mentioned bill of exchange is as follows, that is to say: [here set out the bill:] he the said J. S., afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting, on the said last mentioned bill of exchange, an acceptance of the said last mentioned bill of exchange; which said false, forged, and counterfeited acceptance is as follows, that is to say: accepted, payable at the bank of Messrs. Coutts and Co., John Giles: [or as the acceptance may be ;] with intention to defraud the said J. N.: against the form of the statute in such case made and provided, and against the peace of our lord
[198] the King, his crown *and dignity. (*Fifth count.* Same as the last, to the end of the copy of the bill of exchange; and then as fol-

lows:) and on which said last mentioned bill of exchange was then and there written a certain false, forged, and counterfeited acceptance of the said last mentioned bill of exchange, which said false, forged, and counterfeited acceptance of the said last mentioned bill of exchange, is as follows, that is to say: [here set out the acceptance, as in the last count:] he the said J. S., well knowing the premises last aforesaid, afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did utter and publish as true, the said false, forged, and counterfeited acceptance of the said last mentioned bill of exchange, with intention to defraud the said J. N., (he the said J. S., at the time he so uttered and published the said false, forged, and counterfeited acceptance of the said last mentioned bill of exchange, then and there well knowing the said acceptance to be false, forged, and counterfeited): against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. Add another count like the last, except that for the words "utter and publish as true," you substitute the words "offer, dispose of, and put away," as in the precedent, ante, p. 195. If an indorsement be also forged, add counts for it in this form: and the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, having in his custody and possession, a certain other bill of exchange; which said last mentioned bill of exchange is as follows, that is to say: [here set out the bill] he the said J. S. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting, on the back of the said last mentioned bill of exchange, a certain indorsement of the said bill of exchange; which said false, forged, and counterfeited indorsement is as follows, that is to say: James Sykes and Co.; with intention to defraud the said J. N.: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (Eighth count, same as the last, to the end of the copy of the bill of exchange; and then as follows:) and on the back of which said last mentioned bill of exchange, was then and there written a certain false, forged, and counterfeited indorsement of the said last mentioned bill of exchange; which said last mentioned false, forged, and counterfeited indorsement is as follows, that is to say: James Sykes and *Co.; [199] he the said J. S., well knowing the premises last aforesaid, afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did utter and publish as true the said last mentioned false, forged, and counterfeited indorsement of the said last mentioned bill of exchange, with intention to defraud the said J. N., (he the said J. S., at the time he so uttered and published the said last mentioned false, forged, and counterfeited indorsement of the said last mentioned bill of exchange, then and there well knowing the said indorsement to be false, forged, and counterfeited:) against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. Add another count, like the last, except that for the words "utter and publish as true," you substitute the words "offer, dispose of, and put away," as in the precedent, ante, p. 195. Supposing J. N. to be the person to whom the bill was uttered or passed, add other sets of counts, charging the forging and uttering to have been with intent to defraud the drawer, acceptor, and indorser re-

spectively. From the above precedent, an indictment may readily be framed for forging and uttering a promissory note, merely substituting for the words "bill of exchange," the words "promissory note for the payment of money," and omitting of course the counts as to the acceptance.

Felony, death. 45 G. 3 c. 89. s. 1.

Evidence.

Produce the bill of exchange in evidence, and prove the forgery and uttering as directed, ante, p. 190, &c.

A bill ten days after sight, purporting to have been drawn upon the commissioners of the navy, by a lieutenant, for the amount of certain pay due to him, has been holden to be a bill of exchange within this act. R. *v.* Chisholm, 2 Russel, 1624. So, a note promising to pay A. & B., "stewardesses" of a certain benefit society, or their "successors," a certain sum of money on demand, has been holden to be a promissory note within the meaning of the act, although it appeared that the society were not duly enrolled, as directed by act of parliament: for, supposing the note to be a genuine instrument, if the successors would not be entitled to the money, the personal representatives of A. and B. would; and to be within the meaning of this act, it is not necessary that the note should be negotiable. R. *v.* Box, 6 Taunt. 325. But in order that a promissory note should be within the meaning of this act, it is necessary that it should be for the payment of money only; and therefore a country bank note for the payment of one guinea, "in cash *or* bank of England note," was holden not to be within the statute. R. *v.* Wilcock, 2 Russel, 1623.

[200] **Indictment for forging and uttering a Bank Note.*

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, feloniously did forge, and counterfeit, a certain bank note; which said forged and counterfeited bank note is as follows, that is to say: [*here set out the bank note in words and figures correctly,*] with intent to defraud the governor and company of the bank of England: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*2d count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, dispose of, and put away a certain other forged, and counterfeited bank note; which said last mentioned forged, and counterfeited bank note is as follows, that is to say: [*here set out the bank note,*] with intent to defraud the said governor and company of the bank of England, (he the said J. S., at the time he so offered, disposed of, and put away the said last mentioned forged, and counterfeited bank note, as aforesaid, then and there well knowing the same to be forged, and counterfeited:) against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*Third count.*) And the jurors aforesaid upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did falsely make, forge, and counterfeit, and did

cause and procure to be falsely made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting, a certain promissory note for the payment of money; which said false, forged, and counterfeited promissory note is as follows, that is to say: [*here set out the bank note,*] with intention to defraud the said governor and company of the bank of England: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*4th count.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, dispose of, and put away a certain other false, forged, and counterfeited promissory *note for [201] the payment of money; which said last mentioned false, forged, and counterfeited promissory note is as follows, that is to say: [*here set out the bank note,*] with intention to defraud the said governor and company of the bank of England, (he the said J. S., at the time he so offered, disposed of, and put away the said last mentioned false, forged, and counterfeited promissory note, as aforesaid, then and there well knowing the same to be false, forged, and counterfeited:) against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *Add another set of counts, charging the forging, &c. to have been committed with intent to defraud the person to whom the note was uttered or passed. In the counts for offering and disposing of the note, it is not necessary to allege to whom it was so offered, &c.* R. *v.* Holden, 2 Taunt. 334.

Felony, death. 45 G. 3. c. 89. s. 2, 1. *The second section here referred to, extends to bank notes, bank bills of exchange, dividend warrants, bonds or obligations under the common seal of the bank, and to indorsements thereon.*

Evidence.

Prove the forgery, as directed ante, p. 190, &c. Under the counts for uttering, you may give in evidence that the defendant offered or tendered the note in payment, or that he actually passed it, or otherwise disposed of it, to another person. Where it appeared that the defendant sold a forged note to an agent employed by the bank to procure it from him, the judges held this to be within the act, although it was objected that the prisoner had been solicited to commit the act proved against him, by the bank themselves, by means of their agents. R. *v.* Holden, 2 Taunt. 334. So, where A. gave B. a forged note to pass for him, and upon B.'s tendering it in payment of some goods, it was stopped: the majority of the judges held that A., by giving the note to B., was guilty of disposing of, and putting away the note, within the meaning of the act. R. *v.* Palmer & al. 1 New Rep. 96. As to evidence that the prisoner knew the note to be forged, at the time he disposed of it, and as to the other evidence necessary to support these counts, see ante, p. 194, 195.

Indictment for having a forged Bank Note in his possession.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S. late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, feloniously, *knowingly, and wittingly, and without [202] lawful excuse, had in his possession and custody divers forged

and counterfeited bank notes, to wit, one forged and counterfeited bank note, which said forged and counterfeited bank note is as follows, that is to say: [*here set out the bank note in words and figures correctly;*] and one other forged and counterfeited bank note, which said last mentioned forged and counterfeited bank note is as follows, that is to say: [*here set out the other bank note;*] he the said J. S. then and there well knowing the said several bank notes, and each and every of them, to be forged and counterfeited: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *Some precedents add a count as to one of the notes set out in the first count; but this does not seem to be necessary.*

Felony, 14 years transportation. 45 G. 3. c. 89. s. 6. *This section extends to bank notes, bank bills of exchange, bank post bills, blank bank notes, blank bank bills of exchange, and blank bank post bills.*

Evidence.

Prove that the defendant had in his possession the bank notes set out in the indictment, or one of them; and prove the notes to be forgeries, as directed ante, p. 192, &c. The act says "in his possession or custody, or in his dwelling house, out-house, lodgings, or apartments." If the notes were found in the defendant's dwelling house, out-house, lodgings, or apartments it may be prudent perhaps so to state the fact in the indictment, or, at least, in one of the counts. As to the defendant's knowledge that the notes found upon him were bad, it can be proved by circumstantial evidence only. See ante, p. 195.

Care must be taken that the note or notes produced in evidence, correspond with the statement of them in the indictment, in the same manner as in forgery. See ante, p. 192.

Indictment for forging a Receipt.

Commencement, as in the last precedent.] County aforesaid, feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did wittingly act and assist in the false making, forging, and counterfeiting a certain acquittance and receipt for money, which said false, forged, and counterfeited acquittance and receipt for money is as follows, that is to say: [*here set out the receipt, in words and figures, correctly.* See ante, p. 189.] with intention to defraud J. N.: against the form of the statute in such case made
[203] and provided, and against the peace of *our lord the King, his crown and dignity. (*2d count.*) And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did utter and publish as true, a certain other false, forged, and counterfeited acquittance and receipt for money, which said last mentioned false, forged, and counterfeited acquittance and receipt for money is as follows: [*here set out the receipt,*] with intention to defraud the said J. N., (he the said J. S., at the time he so uttered and published the said last mentioned false, forged, and counterfeited acquittance and receipt, as aforesaid, then and there well knowing the same to be false, forged, and counterfeited:) against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *Add a count, that the defendant did* "offer, dispose of, and put

away" *a certain other acquittance and receipt for money, and similar in every other respect to the last.* See ante, p. 195.

Felony, death. 45 G. 3. c. 89. s. 1. *The words in the statute are* "acquittance or receipt, either for money or goods." *Where the receipt is for goods, the indictment may be framed as above, only substituting the words* "receipt for goods," *for the words* "acquittance and receipt for money."

Evidence.

Prove the forgery and uttering, &c., as directed ante, p. 190, &c. It has been holden that a receipt for *bank notes* is not an acquittance or receipt for money or goods, within the meaning of the act. R. *v.* Harrison, 1 Leach, 180, 2 East, P. C. 926. So, a scrip receipt, in which a blank was left for the subscriber's name, was holden not to be a receipt within this statute; R. *v.* Lyon, 2 Leach, 597. and see Id. 808, &c.; but otherwise, if the blank had been filled up.

Indictment for forging a banker's draft, or other order for the payment of money, or delivery of goods.

The same as the last precedent, only substituting the words "*warrant and order for payment of money,*" or, "*warrant and order for delivery of goods,*" for the words "*acquittance and receipt for money.*"

Felony, death. 45 G. 3. c. 89. s. 1.

Evidence.

Prove the forgery and uttering, &c., as directed ante, p. 190, &c. It only remains here to shew what warrants and orders are within the meaning of the act.

A draft upon a banker, is a warrant and order for the payment [204] of money, within the statute; R. *v.* Willoughby, 2 East, P. C. 944; so is even a bill of exchange. R. *v.* Shepherd, 1 Leach, 226. So an order to pay "all my prize money due to me for my services on board his Majesty's ship Leander," without specifying any particular sum, was holden to be within the act. R. *v.* M'Intosh, 2 East, P. C. 942. So, an order "to deliver my work to bearer" (and which was explained in evidence to mean an order to Goldsmith's hall to deliver certain articles of plate a silversmith had sent there to be marked,) was holden to be within the act, although it did not specify any particular articles. R. *v.* Jones, 1 Leach, 53.

The order must purport to be signed by some person who might command the payment of the money, or the delivery of the goods, and to be directed to a person who was compellable to obey it. See R. *v.* Clinch, 2 East, P. C. 938. And therefore an order to a tradesman to let the bearer have certain goods, and which it was optional with the tradesman to obey or not, was holden not to be within the act, R. *v.* Williams, 1 Leach, 114. R. *v.* Mitchell, Fost. 119. and see R. *v.* Ellor, 1 Leach, 323. In such a case, we have seen, (ante, p. 162, 161.) the defendant should be indicted on stat. 33 H. 8. c. 1. s. 1. So, a forged magistrate's order for a reward for apprehending a vagrant, which appeared upon the face of it to be defective, as not being under seal, or directed to the constable, &c., was holden not to be within the statute; for without these requisites, it was nothing more than the order of a mere individual, which the treasurer was not bound to obey. R. *v.* Rushworth, 2 Russel, 1643. But a

forged draft on a banker, in a fictitious name, or in the name of a person who never kept cash with the banker, is a warrant or order within the meaning of the act; R. *v.* Lockett, 1 Leach, 94. R. *v.* Abraham, 2 East, P. C. 941, for it imports, upon the face of it, to be an order by a person having authority to make it. Where, on the contrary, a man obtains goods upon his own draft on a banker, with whom he does not keep cash, we have seen (ante, p. 160.) that the proper mode of proceeding against him criminally, is by indictment on stat. 30 G. 2. c. 24. s. 1, for the fraud.

And lastly, the order must purport to be directed to the person having possession of the money or goods; and therefore where an order to deliver to the bearer 8*lbs.* of silk, did not appear to be directed to any person, it was holden by the judges not to be within the act. R. *v.* Clinch. 2 East, P. C. 938.

Indictment, at common law, for forging a fieri facias.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B. in the county of M., [205] labourer, on the third day of May, in the third *year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, unlawfully, and wickedly contriving to injure, oppress, impoverish, and defraud one J. N., then and there unlawfully, knowingly, and falsely did forge and counterfeit a certain writing on parchment, purporting to be a writ of our lord the King of *fieri facias*, and to have issued out of the court of our said lord the King of the Bench at Westminster, in the county aforesaid; which said false, forged, and counterfeited writing is as follows, that is to say: [*here set out the fieri facias verbatim;*] with intent the said J. N., to injure, oppress, impoverish, and defraud: to the great damage of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *This count appears to be sufficient, without stating that the writ was actually executed, or the prosecutor's goods seized under it. However, it may be as well to add a second count, similar to the above, to the end of the statement of the fi. fa., and then continued thus:* with intent the said J. N. to injure, oppress, impoverish, and defraud. And the said J. S. afterwards, and before the said last mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, the said last mentioned false, forged, and counterfeited writing, knowingly, falsely, and deceitfully, as a true writ of our said lord the King of *fieri facias*, did cause to be delivered to the then sheriff of Middlesex, for execution to be made thereof; and afterwards, and before the said last mentioned pretended writ purported to be returnable, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did cause to be seized and taken divers goods and chattels of the said J. N. to a large amount, by pretence of the said pretended writ; to the great damage of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. (*3d count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, falsely, and deceitfully did utter and publish, as a true writ of our lord the King of *fieri facias*, a certain other false, forged and counterfeited writing on parchment, purporting to be a writ of our lord the King of *fieri facias*, and to have issued out

of the court of our lord the King of the Bench at Westminster, in the county aforesaid, which said false, forged, and counterfeited writing is as follows, that is to say: [*here set out the writ verbatim,*] with intent the said J. N. to injure, oppress, impoverish, and defraud, (he the said J. S., at the time he so uttered and published the said last mentioned false, forged, and counterfeited writing, as aforesaid, then and there well knowing *the same to be false, forged, and counterfeited.) [206] And the said J. S. afterwards, and before the said last mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, the said last mentioned false, forged and counterfeited writing, knowingly, falsely, and deceitfully, as a true writ of our lord the King of *fieri facias*, did cause to be delivered to the then sheriff of Middlesex, for execution to be made thereof; and afterwards, and before the said last mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, did cause to be seized and taken divers goods and chattels of the said J. N. to a large amount, by pretence of the said pretended writ: to the great damage of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Misdemeanor at common law. The forging and counterfeiting of any writing, or uttering and publishing it as true, knowing it to be forged and counterfeited, with a fraudulent intent, whereby another may be prejudiced, is a misdemeanor at common law, in all cases where it has not been made felony by statute. See 2 East, P. C. 861. *Thus, counterfeiting a letter of credit,* 1 Str. 12, *a bill of lading,* 1 Salk. 342, *a debtor's discharge,* R. *v.* Fawcet, 2 East, P. C. 862, *and the like* (see 2 East, P. C. 862,) *are forgeries at common law.*

Evidence.

Prove the forgery and uttering, as directed ante, p. 190, &c. Prove also the delivery of the writ to the sheriff, and the levy under it, as stated in the indictment. If the forgery be proved, it should seem to be sufficient, although the prosecutor fail in proof of the delivery of the writ to the sheriff, and of the levy under it: for, notwithstanding some ancient authorities to the contrary, it does not appear to be necessary that the fraud contemplated, should have been actually effected by the forgery, to render it indictable at common law; the mere intent to defraud seems to be sufficient. See 2 East, P. C. 861, 862.

Indictments for Forgery in other cases.

With the assistance of the precedents already given (and which are those most generally required in practice,) indictments may readily be framed upon any of the other statutes upon the subject of forgery, attention being paid to the operative words in the statute creating the offence.

The following is a concise list of the statutes relating to forgery, which have not already been mentioned under the foregoing precedents.

*1. As to records, &c.:—Avoiding records, felony. 8 H. [207] 6. c. 12. s. 3. Forging a court roll, imprisonment for life, forfeiture of lands, &c. 5 El. c. 14. s. 3. Forging a memorial or certificate of registry of lands in Yorkshire or Middlesex, imprisonment for life, for-

feiture of lands, &c. 2 & 3 A. c. 4. s. 19. 5 & 6 A. c. 18. s. 8. 7 A. c. 20. s. 15. 8 G. 2. c. 6. s. 31. Forging a marriage license, or an entry of a marriage in the register book, felony, death. 26 G. 2. c. 33. s. 16.

2. As to the revenue:—Forging the stamps on paper, &c., playing cards, plate, &c., felony, death. 52 G. 3. c. 143. s. 7, 8. 55 G. 3. c. 184. s. 7. 55 G. 3. c. 185. s. 6, 7. Forging permits, or the stamp thereon, or making paper with the watermark "*Excise*" therein, felony, death. 23 G. 3. c. 70. s. 9. 52 G. 3. c. 143. s. 9. Forging debentures or certificates for payment or return of money, required by statutes relating to the customs or excise, felony, death. 52 G. 3. c. 143. s. 10. Forging the stamp denoting the duty to have been paid on paper, pasteboard, &c., felony, transportation. 49 G. 3. c. 81. s. 1. Forging the stamp on linens, calicoes, silks, or stuffs, felony, death. 10 A. c. 19. s. 97. 13 G. 3. c. 56. s. 5. See 52 G. 3. c. 142. s. 1. Forging the mark of postage on letters, fine and imprisonment. 54 G. 3. c. 169. s. 14. Forging franks, felony, transportation for seven years. 24 G. 3. sess. 2. c. 37. s. 9. 42 G. 3. c. 63. s. 14. Forging a hawker's license, 300*l.* fine. 50 G. 3. c. 41. s. 18. Forging lottery tickets, &c. felony, death. 49 G. 3. c. 94. s. 11.

3. As to the public securities:—Forging a transfer of stock, or a power of attorney to transfer it, or transferring it by personating the proprietor, felony, death; 8 G. 1. c. 22. s. 1. 31 G. 2. c. 22. s. 77. 33 G. 3. c. 30. s. 1, 2; and the same with relation to bank stock, or the stock of any other corporate body. 4 G. 3. c. 25. Forging the names of witnesses to such letter of attorney, felony, transportation for seven years. 37 G. 3. c. 122. Forging exchequer bills, felony, death. 48 G. 3. c. 1. s. 9, and see the different statutes for issuing them.

4. As to public officers:—Forging the name of the registrar of the high court of admiralty, or the bank receipts for suitors' money, felony. 53 G. 3. c. 151. s. 12. Forging the hand of the accountant general, registrar, &c. of the court of chancery, or of a cashier of the bank, to any instrument relating to suitors' money, felony, death. 12 G. 1. c. 32. s. 9. Forging the handwriting of the receiver general of the customs, &c. to any draft, &c. upon the bank, felony, death. 46 G. 3. c. 150. s. 10. Forging the handwriting of the receiver general of excise, &c. to any draft, &c. upon the bank, felony, death. 46 G. 3. c. 75. s. 8. Forging the handwriting of the treasurer, or other signing or vouching officer of the navy, to any paper whereby his Majesty's naval treasure
[208] may be paid or disposed *of: See 1 G. 1. st. 2. c. 25. s. 6. Forging the handwriting of the treasurer of the ordnance, &c. to any draft, &c. on the bank, felony, death. 46 G. 3. c. 45. s. 9. Forging the handwriting of the receiver general of the post office, &c. to any draft, &c. on the bank, felony, death. 46 G. 3. c. 83. s. 9. 47 G. 3. sess. 2. c. 59. s. 3. Forging the handwriting of the receiver general of the stamp duties, &c. to any draft, &c. on the bank, felony, death. 46 G. 3. c. 76. s. 9. Forging the handwriting of the agent general of volunteers and local militia, &c. to any draft, &c. on the bank, felony, death. 54 G. 3. c. 151. s. 16. Forging the handwriting of the surveyor general of woods and forests, &c. to any draft, &c. on the bank, felony, death. 46 G. 3. c. 142. s. 14. Forging the mark or handwriting of the receiver general of the prefines upon any writ of covenant, felony, death. 52 G. 3. c. 143. s. 5. Forging any contracts, certificates, receipts, &c. relating to the redemption of the land tax, felony, death. 52 G. 3. c. 143. s. 6.

5. As to officers in the navy and army:—Forging any letter of attorney, order, assignment, last will, &c., in order to receive pay or prize money due to any officer or seaman, or any marine officer or marine,

felony, death. 57 G. 3. c. 127. s. 4. Forging any letter of attorney, order, last will, &c., in order to receive money due on account of any out-pension granted by Greenwich hospital, felony, death. 54 G. 3. c. 110. s. 6. Forging bills, &c. drawn by officers of the navy for their half pay, felony, death. 56 G. 3. c. 101. s. 4. Forging the signature of the parish minister, to the certificate to obtain probate of a seaman's will, or administration to him, felony, transportation. 55 G. 3. c. 60. s. 31. Forging the name of any officer of the navy, entitled to allowances on the compassionate list, or of any marine officer entitled to half pay, to any remittance bill, certificate, voucher, or receipt in relation to the same, felony, transportation. 49 G. 3. c. 45. s. 11. Forging the name of any officer's widow to any remittance bill, certificate, voucher, or receipt, respecting her pension, felony, transportation. 45 G. 3. c. 35. s. 10.

6. As to public companies, &c.:—Forging a bond of the East India or South Sea Company, felony, death. 12 G. 1. c. 32. s. 9. 9 A. c. 21. s. 57. Forging a receipt or warrant of the South Sea Company for subscriptions, felony, death. 6 G. 1. c. 11. s. 50. As to forging the stock of these and other corporate bodies, see 4 G. 3. c. 24, ante, p. 207.

7. As to public trade:—Forging Mediterranean passes, felony, death. 4 G. 2. c. 18. s. 1. Forging a shipping license, penalty 500*l*. 47 G. 3. sess. 2. c. 66. s. 26. Forging quarantine certificates, felony, death. 46 G. 3. c. 98. s. 8. Forging certificates, &c. mentioned in the act for the abolition of the slave *trade, felony, death. 47 G. 3. [209] sess. 1. c. 36. s. 12. Forging the assay marks on gold and silver plate, transportation for 14 years. 13 G. 3. c. 59. s. 2. 38 G. 3. c. 69. s. 7, and see 24 G. 3. sess. 2. c. 53. s. 16.

All these statutes, with a very few exceptions, make the uttering these forged instruments, respectively, knowing them to be forged, equally penal with forging them.

*CHAPTER II.

Offences against the Persons of Individuals.

SECT. 1. *Murder.*
2. *Manslaughter.*
3. *Assault, battery, &c.*
4. *False Imprisonment.*
5. *Child Stealing.*
6. *Rape.*
7. *Sodomy.*

SECT. 1.

MURDER.

Indictment for Murder, by Stabbing.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S. late of the parish of B., in the county of M., labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid in the county aforesaid, in and upon one J. N., in the peace of God and our said lord the King then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said J. S., with a certain knife, of the value of sixpence, which he the said J. S. in his right hand then and there had and held, the said J. N., in and upon the left side of the belly, between the short ribs of him the said J. N., then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said J. N. then and there, with the knife aforesaid, in and upon the said left side of the belly, between the short ribs of him the said J. N. one mortal wound, of the breadth of three inches, and of the depth of six inches; of which said mortal wound, the said J. N., from the said third day of May, in the year aforesaid, until the fifteenth day of the same month of
[211] *May, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live; on which said third day of May, in the year aforesaid, the said J. N., at the parish aforesaid, in the county aforesaid, of the said mortal wound died: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S. the said J. N., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder: against the peace of our lord the King, his crown and dignity. As to the venue, see ante, p. 3, 4, 5.

Felony, death. 23 H. 8. c. 1. 1 Ed. 6. c. 12. *Upon this indictment, the defendant may be acquitted of the murder, and found guilty of manslaughter, or excusable homicide. Vide post.*

Evidence for the prosecution.

In and upon one J. N.] It must be proved that J. N. was the person killed; otherwise the defendant must be acquitted. Ante, p. 10, 11. If the name of the deceased be unknown, it should be stated so in the indictment. Id.

In the peace of God, and our said lord the King.] This does not require proof. If the deceased, however, were an alien enemy, and killed in the actual heat and exercise of war, this is matter of justification, which may be proved upon the part of the defendant. See 1 Hale, 433. But it is no matter either of excuse or justification, that the deceased was a jew, an outlaw, or one attainted of felony or præmunire. Id.

With a certain knife, &c.] It is not necessary to prove this strictly as laid; if it be proved that the deceased was killed with any other instrument, as with a dagger, sword, staff, bill, or the like, capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material. R. *v.* Mackally, 9 Co. 67 a. Gilb. Ev. 231. But if the species of death would be different, as if the indictment allege a stabbing or shooting, and the evidence prove a poisoning or starving, the variance would be fatal; Id.; and the same, if the indictment state a poisoning, and the evidence prove a starving. But if the indictment allege a death by one kind of poison, proof of a death by another kind of poison will support the indictment. Id. and see 2 Hale, 185, 186. 2 Hawk. c. 23. s. 84.

The value of the instrument is immaterial, It seems to be stated in the indictment because the instrument is forfeited as a deodand to the King, and the township is liable for the value of it, if it be not forthcoming, see 2 Hale, 185.

In his right hand, &c.] It is necessary to allege in the *indictment, in which hand the defendant held the weapon; 2 [212] Hale, 185; but it is not necessary to prove it.

In and upon the right side.] The indictment must shew with certainty in what part of the body the deceased was wounded; and therefore if it allege the wound to have been on the arm, hand, or side, without saying whether the right or the left, it is bad. 2 Hale, 185. In this and in other instances, there is a particularity required in indictments for murder, that it would be ridiculous to attempt to account for, or justify; for the same strictness is not required as to the evidence necessary to support it; if, for instance, the wound be stated to be on the left side, and proved to be on the right, or alleged to be on one part of the body, and proved to be on another, the variance is immaterial. 2 Hale, 186.

Of his malice aforethought.] The law presumes every homicide to be murder, until the contrary appears. Fost. 255. Therefore the prosecutor is not bound to prove malice, or any facts or circumstances, besides the homicide, from which the jury may presume it; and it is for the defendant to give in evidence such facts and circumstances as may prove the homicide to be justifiable, or excusable, or that at most it amounted to but manslaughter. Vide post.

Did strike and thrust.] In all cases where the death is caused by personal violence, it is essential to the indictment that it should allege that the defendant struck the deceased; see 5 Co. 122 a. 2 Hale, 184. 2 Hawk. c. 23. s. 82; and it must also be proved. But we have seen (ante, p. 211,) that it is not necessary to prove that he struck him with the instrument mentioned in the indictment; and therefore, although the indictment allege that the defendant did strike and thrust, proof of a striking

which produced contused wounds only, would maintain the indictment.

In cases of express malice, the homicide is usually committed in secret, and it is rarely practicable to substantiate it by direct and positive testimony; in most cases, the defendant is convicted upon circumstantial evidence merely. Upon this subject, it is only necessary to refer to what has been already said upon the doctrine of Presumptions, ante, p. 77, 78; repeating here merely the rule laid down by Lord Hale, never to convict a man of murder or manslaughter, on circumstantial evidence alone, unless the body have been found. 2 Hale, 290.

In cases of implied malice (*vide post*), the homicide is usually committed in the presence of others, who may prove it; if not, it must be proved by circumstantial evidence.

[213] **One mortal wound of the breadth, &c.*] The length and breadth of the wound must be shewn in all cases where it is possible to do so; but not where it is alleged that a limb was cut off, or that the wound was a contused wound merely. 2 Hale, 186. But even where necessary to be stated, it need not be proved as laid; evidence of another species of wound, in another part of the body, if the party died of it, is sufficient to maintain the indictment. *Id.*

Of which said mortal wound, &c.] The dates here stated in the indictment, need not be proved as laid. All that is necessary to be proved, to support this part of the indictment, is, that the deceased died of the wound or wounds given him by the defendant within a year and day after he received them; for if he died after that time the law would presume that his death had proceeded from some other cause than the wounds. 1 Hawk. c. 23. s. 90.

If a man be wounded, and the wound turn to a gangrene or fever for want of proper applications or from neglect, and the man die of the gangrene or fever: this is a homicide, and murder, or not, according to the circumstances under which the wound was given. 1 Hale, 428. But if it appeared that the man's death was caused by improper applications to the wound, and not by the wound itself, it would be otherwise. *Id.*

Evidence for the defendant.

The defendant has to prove, either that the murder was not committed by him, or that the offence actually committed does not amount to murder. This defence may be, and frequently is, made out by the examination in chief of the witnesses for the prosecution; but if not, it may be proved from their cross-examination, or by witnesses called upon the part of the defendant.

We have seen (ante, p. 212,) that the prosecutor is not bound to prove that the homicide was committed from malice prepense; if he prove the homicide merely, the law from thence presumes the malice. The malice, in such a case, however, is only presumed; and the defendant may rebut that presumption, by proving that the homicide was *justifiable* or *excusable*, or that at most it amounted to *manslaughter* only, and not to *murder*.

Justifiable homicide is of three kinds: 1. Where the proper officer executes a criminal, in strict conformity with his sentence. 2. Where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. 3. Where the homicide is committed in prevention of a forcible and atrocious crime: as, for instance, if a man attempt to rob or

*murder another, and be killed in the attempt, the slayer shall be acquitted and discharged. 24 H. 8. c. 5. See Bract. 155. 1 Hale, 488, and post.

Excusable homicide is of two kinds: 1. Where a man, doing a *lawful* act, without any intention of hurt, by accident kills another: as, for instance, where a man is working with a hatchet, and the head by accident flies off and kills a person standing by. This is called homicide *per infortunium*, or by misadventure. 2. Where a man kills another, upon a sudden rencounter, merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling; which is termed homicide *se defendendo*. If the defendant be found guilty of excusable homicide merely, he shall have a pardon and a writ of restitution of his goods, as a matter of right. And, indeed, to prevent the expense of a pardon, &c., in cases where the death has notoriously happened by misadventure or in self defence, the judges usually permit (if not direct) a general verdict of acquittal. Fost. 288. 4 Bl. Com. 188.

Manslaughter is the unlawful and felonious killing of another, without any malice either express or implied. It is of two kinds: 1. Involuntary manslaughter, where a man, doing an *unlawful* act not amounting to felony, by accident kills another. 2. Voluntary manslaughter. where upon a sudden quarrel two persons fight, and one of them kills the other; or where a man greatly provokes another by some personal violence, &c., and the other immediately kills him. Manslaughter is felony, within clergy.

Murder is thus defined or described by Lord Coke: (3 Inst. 47:) "Where a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied."

1. It must be committed by a person of sound memory and discretion: it cannot be committed by an ideot, lunatic, or infant, unless indeed he shew a consciousness of doing wrong, and of course a discretion, or discernment between good and evil. 4 Bl. Com. 195, 196. 20 et seq. 1 Hawk. c. 1. But if any person procure an ideot, &c. to murder another, the procurer is guilty of the murder, 1 Hawk. c. 31. s. 7, although perhaps not present at the time it was committed.

2. It must be an unlawful killing, not excusable or justifiable. It may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. 4 Bl. Com. 196. 1 Hale, 431. Taking away a man's life by perjury, however, is not, it seems, in law, murder, see R. v. Macdaniel and al. Fost. 132, and see 4 Bl. Com. 196 n., although in *foro conscientiæ* it is as much so as killing with a sword. If a man however do any other act, of which the *probable consequence may be, and eventually is, death, [215] such killing may be murder, although no stroke were struck by himself: as was the case of the unnatural son who exposed his sick father to the air, against his will, by reason whereof he died; 1 Hawk. c. 31. s. 5; and of the harlot, who laid her child in an orchard, where a kite struck it and killed it. 1 Hale, 432. So, where an apprentice died, from harsh treatment, and want of care upon the part of his master, whilst he was labouring under disease: this was holden to be murder in the master. R. v. Squire & ux. 1 Russel, 620. If a man have a beast that is used to do mischief, and he, knowing it, suffer it to go abroad, and it kill a man, this it seems is manslaughter in the owner; but if he had purposely turned it loose, though barely to frighten people, and to make what is called sport, it is as much murder as if he had incited a bear or a dog to worry

them. 1 Hale, 431. 4 Bl. Com. 197. If a man have a disease, which in all likelihood would terminate his life in a short time, and another give him a wound or hurt which hastens his death, this is such a killing as constitutes murder. 1 Hale, 428. So, if a man be wounded, and the wound turn to a gangrene or fever, for want of proper applications, or from neglect, and the man die of the gangrene or fever: this is also such a killing as would constitute murder; 1 Hale, 428; but otherwise if the death of the party were caused by improper applications to the wound, and not by the wound itself. *Id.* And it is a general rule, that to make the killing murder, the death must follow within a year and day after the stroke, or other cause of it.

3. The person killed must be a reasonable creature in being and under the King's peace. Therefore, to kill a child in its mother's womb, is no murder: but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it is murder in the person who administered or gave them. 3 Inst. 50. As to the words "the King's peace" in the definition of murder, they mean merely that it is not murder to kill an alien enemy, in time of war; 3 Inst. 50. 1 Hale, 433; but killing even an alien enemy within the kingdom, unless in the actual exercise of war, would be murder. 1 Hale, 433.

4. And lastly, the killing must be committed with malice aforethought. Malice is either express or implied. Express malice is when one, with a sedate and deliberate mind, and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. 1 Hale, 451. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shews him to be an enemy to mankind in
[216] general; as, going deliberately *with a horse used to strike, or discharging a gun among a multitude of people. 1 Hawk. c. 29. s. 12. So, if a man resolve to kill the next person he meets, and do kill him, it is murder, although he knew him not; for it is universal malice, 4 Bl. Com. 200. And it may be necessary here to observe, that no provocation, however great, will extenuate or justify a homicide, where there is evidence of express malice. See R. *v.* Mason, Fost. 132. So, where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him; upon which B. did strike, and A. thereupon killed him: this was holden to be murder. 1 Hawk. c. 31. s. 24.

And in many cases, where no malice is expressed or openly indicated, the law will imply it. Thus where a man wilfully poisons another,—in such a deliberate act the law presumes malice, though no particular enmity can be proved. 1 Hale, 455. So, if a man kill another suddenly, without any, or without a considerable, provocation; if he kill an officer of justice in the legal execution of his duty; if, intending to do another *felony*, he undesignedly kill a man: in all these cases the law implies malice, and the offence is murder.

As there are many very nice distinctions, however, upon this subject of malice prepense, express, and implied, it may be desirable to consider the subject more fully and minutely; and which we shall do, under the following heads.

Killing by poison.] Of all the forms of death, by which human nature may be overcome, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought. 3 Inst. 48. And therefore in all cases where a man wilfully administers

poison to another, 1 Hale, 455, or lays poison for him, and either he or another takes it, and is killed by it, Id. 466, the law implies malice, although no particular enmity can be proved. If, however, it were administered by mistake, or if it were laid with an innocent intention in the place from which the deceased took it, it is merely homicide by misadventure So, if a physician or surgeon give his patient a potion or plaster to cure him, which contrary to expectation kills him, this also is neither murder nor manslaughter, but misadventure. Mirr. c. 4. s. 16. A distinction, indeed, has been taken between the administering a potion, &c. by a regular physician, &c., and one who is not so, and the death in the latter case is said to be manslaughter at the least; Brit. c. 5. 4 Inst. 251; but lord Hale very much questions the soundness of this distinction. 1 Hale, 430.

Killing by fighting.] Killing by fighting may be either murder, or manslaughter, or homicide *se defendendo*, according to circumstances.

1 If two persons quarrel and afterwards fight, and one of *them kills the other,—in such a case, if there intervened, be- [217] tween the quarrel and the fight, a sufficient cooling time for passion to subside, and reason to interpose, the killing would be murder; Fost. 296. 1 Hale. 453; but if such a time had not intervened, if the parties, in their passion, fought immediately or even if immediately upon the quarrel they went out and fought in a field (for this is deemed a continued act of passion,) the killing in such a case would be manslaughter only, 3 Inst. 51. 1 Hale, 453. 1 Hawk. c. 31. s. 29. Fost. 295, whether the party killing struck the first blow or not. Fost. 295. 1 Hale, 456.

Therefore if two persons deliberately fight a duel, and one of them be killed, the other and his second are guilty of murder, 1 Hale, 442. 452. 1 Hawk. c. 31. s. 31. see R. *v.* Oneby, 2 Str. 766, no matter how grievous the provocation, or by which party it was given. 3 East, 581. The second of the deceased, also, is deemed guilty of murder, as being present, aiding, and abetting; although lord Hale seems to think the rule of law, as to the principals in the second degree, too far strained in that case. 1 Hale, 442. 452.

And even in the case of a sudden quarrel, where the parties immediately fight, the case may be attended with such circumstances as will indicate malice upon the part of the party killing; and the killing then would be murder, and not merely manslaughter. If, for instance, the party killing, began the attack under circumstances of undue advantage, —as if A. and B. quarrel, and A. draw his sword and make a pass at B., and B. thereupon draw his sword, and they fight, and B. is killed: A. would be guilty of murder; for his making the pass before B. had drawn his sword, shews that he sought his blood. Fost. 295. So, where A. and B. quarrelled, and A. threw a bottle at B., and then drew his sword, and B. then threw the bottle back at A., and wounded him, upon which A. immediately stabbed him; this was holden to be murder. R. *v.* Mawgridge, Kel. 128. But if the parties, at the commencement, attack each other upon equal terms, and afterwards, in the course of the fight, one of them in his passion snatch up a deadly weapon and kill the other with it: this would be manslaughter only. 1 East, P. C. 243. R. *v.* Taylor. 5 Bur. 2793.

So, if there be any other circumstance in the case indicative of malice in the party killing, it will be murder. As, for instance, if two persons fight upon a sudden quarrel, and be separated; and one of them afterwards, having provided himself with a deadly weapon, lies in wait for the other, to have an opportunity, thus armed, to renew the quarrel; and

they accordingly meet, quarrel, and fight, and the man who is armed kills the other: this is murder. See R. *v.* Snow, 1 Leach, 151. 1 East, P. C. 245. So, if two persons fight from malice, and pretend or feign
[218] a reconciliation, and they afterwards meet *and suddenly fight upon the score of the old malice, and one of them be killed: this is murder, and not merely manslaughter. 1 Hale, 451. So, if B. challenge A., and A. refuse to meet him, but tells him that he shall be on his way to such a place upon business at such a time; and B. meet him on his way and assault him, and they fight, and A. kills B: if it appear that A. made this communication for the purpose of evading the law, by giving the fight the appearance of a sudden quarrel, the killing would be murder; but, if the communication were made undesignedly, it would be manslaughter only. 1 Hawk. c. 31. s. 25.

2. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and sword-playing, the succeeding amusement of their posterity: therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is manslaughter. 4 Bl. Com. 183. But it is said, that if the King command or permit such diversion, the act being in that case lawful, the killing would be misadventure only. 1 Hale, 473.

3. If two men fight upon a sudden quarrel, and one of them after awhile endeavours to avoid any further struggle, and retreats as far as he can, until at length no means of escaping his assailant remain to him, and he then turns round and kills his assailant, in order to avoid destruction: this homicide is excusable, as being committed in self defence; Fost. 277; and, malice apart, it is little matter, in such a case, which struck the first blow, at the beginning of the contest. Id. 1 Hale, 482; but see 1 Hawk. c. 29. s. 17. And the same, of course, where one man attacks another, and the latter, without fighting, flies, and then turns round and kills his assailant, as above mentioned. But in either of these cases, to shew that it was homicide *se defendendo*, it must appear that the party killing had retreated, either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him, 1 Hale, 481. 483, for the assault may have been so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence, if there be no other way of saving his own life, he may kill his assailant instantly. The distinction between this kind of homicide and manslaughter, is, that here the slayer could not otherwise escape although he would; in manslaughter he would not escape if he could.

And as the manner of the defence, so is also the time, to be considered: for if the person assaulted do not fall upon the aggressor until the affray is over, or when he is running away, that is revenge and not defence. 4 Bl. Com. 185. Neither, under the colour of self defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if A. and B. agree to fight a duel, and A. give the
[219] first onset, and B. *retreat as far as he safely can, and then kill A., this is murder, because of the previous malice and concerted design. 1 Hale, 479.

Under this excuse of self defence, the principal civil and natural relations are comprehended; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting, being construed the same as the act of the party himself. 1 Hale, 484.

There is one species of homicide *se defendendo*, where the party slain

is equally innocent as he who occasions his death; as, for instance, that case mentioned by Lord Bacon (Elem. c. 5. See also 1 Hawk. c. 28. s. 26.), where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, and he is drowned: this homicide is excusable through unavoidable necessity, and upon the principle of self defence.

4. If, when two persons are fighting, a third come up, and take the part of one of them, and kill the other: this will be manslaughter in the third party; 1 Hawk. c. 31. s. 35, 56; and murder or manslaughter in the person whom he assisted, according as the fight was deliberate and premeditated, or upon a sudden quarrel. Id. s. 55. If the fighting, however, were deliberate, or otherwise of malice, and the third party, when he interfered, knew it to be so, the killing would be murder, both in the party who thus interfered, and in the person whom he assisted. 1 East, P. C. 291, 292. If, on the other hand, the third party, who thus interferes, be killed, it is but manslaughter. Id. and see 12 Co. 87. Kel. 59.

Killing upon provocation.] No provocation whatever can render a homicide justifiable, or even excusable; the least it can amount to is manslaughter. If a man kill another suddenly, without any, or without a considerable, provocation, the law implies malice, and the homicide is murder; but if the provocation were great, and such as must have greatly provoked him, the killing is manslaughter only. Kel. 135. 1 Hale, 466. Fost. 290. In considering, however, whether the killing upon provocation amount to murder or manslaughter, the instrument wherewith the homicide was effected must also be taken into consideration; for if it were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient; in fact, the mode of resentment must bear a reasonable proportion to the provocation, to reduce the offence to manslaughter. Where some provoking words being used by a soldier to a woman, she gave him a box on the ear; and the soldier immediately gave her a blow with the pomel of *his sword on the breast, and [220] then ran after her, and stabbed her in the back; this was at first deemed murder; but it appearing afterwards that the blow given to the soldier was with an iron patten, and that it drew a great deal of blood, the offence was holden to be manslaughter only. R. *v.* Stedman, Fost. 292. Where two soldiers demanded to be admitted to a public house to drink, and the landlord refused, because it was after eleven o'clock at night; one of them, however, upon the door being afterwards opened to let out company, rushed in; and whilst the landlord was struggling to get him out, the other soldier struck the landlord on the head with a sharp instrument, and killed him; this was holden to be murder, notwithstanding the struggle with the other soldier; besides the landlord had a right to put him out of his house. R. *v.* Willoughby, 1 East, P. C. 288. 1 Russel, 635. So, where a park keeper, having found a boy stealing wood, tied him to a horse's tail, and dragged him along the park, and the boy died of the injuries he thereby received: this was holden to be murder. 1 Hale, 454. So, in all other cases, where upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, it is murder. 4 Bl. Com. 199. and see R. *v.* Tranter & al. 1 Str. 499. Fost. 293. An unwarrantable imprisonment of a man's person, however, has been holden sufficient provocation to make a killing, even with a sword, manslaughter only. R. *v.* Buckner, Sty. 467. R. *v.* Wither, 1 East, P. C. 233. So, if a man pull another's nose, or offer him any other great per-

sonal indignity, and the other thereupon immediately kills him, it is manslaughter only. Kel. 135. 4 Bl. Com. 191. Or if a man take another in adultery with his wife, and kill him directly upon the spot, this is manslaughter merely. 1 Hale, 486. R. *v.* Manning, T. Raym. 212. Where a boy, after fighting with another, ran home bleeding to his father; and the father immediately took a small cudgel, and ran three quarters of a mile to the place where the other boy was, and struck him a single blow with the stick, of which blow the boy afterwards died: this was holden to be manslaughter only. R. *v.* Rowley, 12 Co. 87; and see Fost. 294. Where a mob threw a pickpocket into a pond, for the purpose of ducking him, but he was unfortunately drowned: this was holden to be manslaughter. R. *v.* Fray, 1 East, P. C. 236. But it may safely be laid down as a general rule, that no words or gestures, however opprobrious or provoking, will be considered in law to be provocation sufficient to reduce a homicide to manslaughter, if the killing be effected with a deadly weapon, or an intention to do the deceased some grievous bodily harm be otherwise manifested; but if effected with a blow of a fist, or of a stick, or other weapon not likely to kill, it is manslaughter only. Fost. 290, 291. 1 Hale, 455.

[221] *But in all cases, to reduce a homicide upon provocation to manslaughter, it is essential that the battery or wounding, &c. appear to have been inflicted immediately upon the provocation being given; for if there be a sufficient cooling time for a passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge, and not the heat of blood, and accordingly amounts to murder. Fost. 296 So, if there be evidence of express malice, the killing will be murder, however great the provocation. See R. *v.* Mason. Fost. 132, and see Fost. 296.

Killing by correction.] Where a parent is moderately correcting his child, a master his servant or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; but if he exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at the least, and in some cases (according to the circumstances) murder. 1 Hale, 473, 474. Where a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died: these were justly holden to be murders; because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of killing. Id. Fost. 262. So, in all other cases, where the correction is inflicted with a deadly weapon, and the party die of it, it will be murder; if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. Fost. 262. Where a master struck his servant with one of his clogs, because he had not cleaned them, and death unfortunately ensued; it was holden to be manslaughter only, because the clog was very unlikely to cause death, and the master consequently could not have the intention of taking away the servant's life by hitting him with it. R. *v.* Turner, Comb. 407, 408, and see R. *v.* Wigg, 1 Leach, 378 n. and Anon, 1 East, P. C. 261.

Killing, in defence of property, &c.] If any person attempt to rob or murder another in or near the highway, or in a dwelling house, or attempt to break any dwelling house in the night time, and be killed in the attempt, the slayer shall be acquitted and discharged. 24 H. 8. c. 5. And the same, where a man is killed in attempting to burn a house, 1 Hale, 488, or where a woman kills a man who attempts to ravish her, Bac. Elem.

34. 1 Hawk. c. 28. s. 22, or where a man is killed in attempting to break open a house in the day time with intent to rob, 1 Hale, 488, or to commit any other forcible and atrocious crime. Bract. 155. Fost. 273. Kel. 128, 129. 1 Hale, 484 See R. *v.* Levet, Cro. Car. 538, and see Fost. 299. R. *v.* Ford, Kel. 51. And not only the party whose person or property is thus attacked, but his servants, and other members of his *family, and even strangers who are present at the time, are [222] equally justified in killing the assailant. 1 Hale, 481. 484. Fost. 274. The above rule, however, does not extend to felonies without force, such as picking pockets. 1 Hale, 488, nor to misdemeanors of any kind; and even in cases within the rule, it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon, 1 Hale, 484, otherwise the homicide will be manslaughter at least, if not murder. But in cases within the rule, it may be necessary to observe, that the party whose person or property is attacked, is not obliged to retreat, as in other cases of self defence, but may even pursue the assailant until he find himself or his property out of danger. Fost. 273.

What we have now said, relates to felonies by force. In the case of forcible misdemeanors, such as trespass in taking goods, although the owner may justify beating the trespasser, in order to make him desist, yet if he kill him it will be manslaughter: 1 Hale, 485, 486; or if, instead of beating him, he attack him with a deadly weapon, it would perhaps be murder, particularly if the wound were given after the party had desisted from the trespass. Id. 473. But, in defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self defence a man who attacked him personally; with this distinction, however, that in defending his house, he need not retreat as in other cases of *se defendendo*, for that would be giving up his house to his adversary. 1 Hale, 485, 486. As to personal assaults, where the party assaulted kills his adversary, we have already considered them under the foregoing heads.

Killing without intention, whilst doing another act.] If a person, whilst doing or attempting to do another act, undesignedly kill a man,—if the act intended or attempted were a felony, the killing is murder; if unlawful, (*malum in se*) but not amounting to felony, the killing is manslaughter; if lawful, (that is, not being *malum in se*) homicide by misadventure merely. If a man deliberately shoot at A., and miss him, but kill B., this is murder. Fost. 261. 1 Hale, 441. 438. If a man lay poison for A., and B. (against whom he had no malicious intent) take it, and it kill him, this is likewise murder. 1 Hale, 436. R. *v.* Sanders, Plowd. 474. R. *v.* Gore, 9 Co. 81. So, if whilst two men are deliberately fighting, a third go between them to part them, and be killed by one of them: it is murder, 1 Hale, 441, whether he were killed accidentally or designedly. If a man shoot at another's poultry, with intent to steal them, and by accident kill a man, it is murder; if without such intention, it is manslaughter, the act of shooting at the poultry being unlawful, but not felonious. Fost. 258. If a man throw a stone *at a horse, and it hit the rider and [223] kill him, it is manslaughter. 1 Hale, 39. If, when engaged in an unlawful or dangerous sport, a man kill another by accident, it is manslaughter; Fost. 259, 260, 261. 1 Hale, 472, 473. 1 Hawk. c. 29. s. 5.; if the sport were lawful and not dangerous, it would be homicide by misadventure merely. Fost. 260. So, if a man, intending to kill a person attempting to commit a forcible and atrocious crime against his person or property, (*see ante, p.* 221,) by mistake, kill one of his own family, it is

homicide by misadventure merely. See Cro. Car. 538. Where a man is at work with a hatchet, and the head of it flies off and kills a bystander, this is homicide by misadventure. 1 Hawk. c. 29. s. 2. So, if a man shooting at game, by accident kill another, it is homicide by misadventure merely, even although the party be unqualified; Fost. 259; for the use of fire arms by an unqualified person is merely a prohibited act, and not *malum in se.*

There are two seeming exceptions, however, to the above rule. *First*, If two persons be fighting, under such circumstances that if one were killed it would be manslaughter only in the other: if, in such a case, an innocent party be unintentionally killed by one of them, it is manslaughter only. Fost. 262. R. v. Brown, 1 Leach, 148. This, perhaps, is not strictly an exception; for the act in which the parties are engaged, namely, the fighting, is not in itself felonious, although the result of it might be so.

Secondly, Where an act, in itself lawful, is at the same time dangerous, —in order to render an unintentional homicide from it excusable, it must appear that the party, whilst doing the act, used such a degree of caution as to make it improbable that any danger or injury should arise from it to others: if not, the homicide will be manslaughter at the least.

For instance, if a workman throw stones or rubbish, &c. from a house, and thereby kill a person passing underneath, it is murder, manslaughter, or homicide by misadventure, according to the degree of precaution taken by him that no person should be injured by them, and of the necessity of such precaution. If he did it without previously warning the persons beneath, and at a time when it was likely that persons were passing, it would be murder; 3 Inst. 57; if at a time when it was not likely that any persons were passing, it would be manslaughter; Fost. 262; if in a retired place, where no persons were in the habit of passing, or likely to pass, it would be misadventure merely. Fost. 262. 1 Hale, 472. 475. But if he previously gave warning to the persons beneath,—then, if it happened in a country village where few persons pass, it is misadventure only; Fost. 262. 1 Hale, 472. 475; if in London or other populous town, (Kel. 40,) at a time when the streets are full, (Fost. 263,) it would be manslaughter.

If a man, breaking an unruly or vicious horse, ride him
[224] *amongst a crowd, and the horse kick a man and kill him: this is murder, if the rider brought the horse into the crowd with an intent to do mischief, or even to divert himself by frightening the crowd; 1 Hawk. c. 31. s. 68; manslaughter, if done heedlessly and incautiously only. 1 East, P. C. 231. See 1 Hale, 475. 1 Hawk. c. 29 s. 12.

If a man, driving a cart or other carriage, drive it over another man, and kill him:—if he saw or had timely notice of the probable mischief, and yet drove on, it would be murder; 1 Hale, 475. Fost. 263; if he purposely drove it furiously in amongst a crowd, it would probably be murder; Semb., if in a street where persons were much in the habit of passing, it would be manslaughter: Per Holt. C. J., 1 East, P. C. 263; if in a place where people did not usually pass, misadventure merely. Anon. 1 East, P. C. 263. *As to accidents by the furious driving of stage coaches*, see 1 G. 4. c. 4; and see 10 G. 2. c. 31, *as to accidents occasioned by the overloading of boats by watermen.*

Where a man lays poison to kill rats, and another man takes it, and it kills him: if the poison were laid in such a manner or place as to be mistaken for food, it is, perhaps, manslaughter; 1 Hale, 431; if otherwise, misadventure only. *Id.*

If a man discharge a loaded gun amongst a multitude of people, and death ensues, it is murder; for the law in such a case will imply malice. 1 Hale, 475. If he discharge it, merely for the purpose of unloading it, or the like, and death ensue,—then, if it were in a place where persons were likely to pass, it is manslaughter; R. *v.* Burton, 1 Str. 481; otherwise, misadventure only. As to spring guns, see Ilot *v.* Wilkes, 3 Barn. & Ald. 304. Where a man gave a loaded gun to his servant, to protect a corn field from deer during the night, with instructions to fire when he heard any bustle in the corn by the deer; and the master himself unfortunately rushed into the corn during the night, and the servant, imagining it to be the deer, fired, and shot his master: this was holden to be misadventure. 1 Hale, 476. Where a man, finding a pistol in the street, brought it home, and imagining (from having tried it with the rammer) that it was not loaded, presented it in sport at his wife, drew the trigger, and killed her: this was holden to be manslaughter; R. *v.* Rampton, Kel. 41; but Foster J. doubts the propriety of the decision, as the defendant took the usual precaution to ascertain that the pistol was not loaded; see Fost. 264, 265; and clearly, if he took not this or other reasonable precaution, it would be manslaughter. If a man, shooting at butts or target, by accident kill a bystander, it is misadventure: 1 Hale, 472, 475. 38: but this must be understood of cases where a proper precaution to prevent accidents has been taken; for if the target, &c. be placed near a highway or path, where persons are in the *habit of passing, the killing would probably be deemed manslaughter. [225]

So, if a man, knowing that people are passing along a street, wantonly throw a stone or shoot an arrow into it, likely to do an injury, with an intent to hurt some of the persons passing, and a person be killed by it, it is murder, although the stone or arrow was not intended to hit any particular person; 1 Hale, 475. 3 Inst. 57; but if it were done thoughtlessly and incautiously, and without intent to hurt any one,—then, if it were thrown or shot into a place where people were in the habit of passing, the killing is manslaughter; 1 Hale, 475. 1 Hawk. c. 29. s. 9; if into a place where persons were not likely to pass, misadventure only.

Killing officers of justice.] If a man kill an officer of justice, either civil or criminal, such as a bailiff, constable, watchman, &c., in the legal execution of his duty, or any person acting in aid of him (whether specially called thereunto or not, 1 Hale, 462,) or any private person endeavouring to suppress an affray, or apprehend a felon, knowing his authority or the intention with which he interposes: the law will imply malice, and the offender will be guilty of murder. 1 Hale, 456, 457. 460. Fost. 308. and seq. And the officer and persons acting in aid of him, enjoy this privilege and protection, *eundo, morando, et redeundo:* therefore, if an officer, on his way to do his duty, be opposed and killed, it is murder; or if he arrive at the place, and in consequence of opposition retreat, and on his retreat be killed, it is murder. Fost. 308, 309. 9 Co. 67 b. 1 Hale, 462. Three things are to be attended to, in matters of this kind: the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority; for if an officer be killed in attempting to execute a writ or warrant invalid on the face of it, or against a wrong person, or out of the district in which alone it could legally be executed; or if a private person interfere and act in a case where he has no authority by law to do so; or if the defendant had no knowledge of the officer's business, or of the intention with which a private person interferes, and the offi-

cer or private person be resisted and killed: the killing will be manslaughter only.

1. As to the legality of the authority: If an officer, having a warrant from a proper magistrate to apprehend B. for felony; or if B. be indicted for felony; or if hue and cry be levied against B.: in these cases, if B. or any of his accomplices kill the officer or any person joining in the hue and cry, it is murder, whether B. be guilty or innocent of the felony charged against him. Fost. 318. But if the warrant were illegal and void upon the face of it, see 1 Hale, 459. 1 East, P. C. 310, or [226] issued with a blank in it, and the blank afterwards filled up, *R. *v.* Stockley, 1 East, P. C. 310, and see 6 T. R. 122. 8 Id. 454, or attempted to be executed against C. instead of B., the killing would be manslaughter only. If a writ of execution in civil cases be correct upon the face of it, although the judgment be erroneous, or the proceedings irregular, if the officer, in endeavouring to execute it, be resisted and killed, it is murder; 1 Hale, 457. Fost. 411, 412; but if the writ were a nullity on the face of it, or if the warrant upon it were attempted to be executed by any other than the officer to whom it was directed, (the officer himself not being present, or at least, acting in the arrest, see Cowp. 65,) the killing would be manslaughter only. If an innocent person be indicted for a felony, and an attempt be made to arrest him for it, without warrant, and he resist and kill the party attempting to arrest him: if the party attempting the arrest were a constable, the killing is murder. 1 Hawk. c. 28. s. 12. 2 Hale, 84. 87. 91; if a private person, manslaughter; see 2 Hale, 83. 92; because the constable has authority by law to arrest in such a case; a private person has not. And the same, in all cases where a person is arrested or attempted to be arrested upon a reasonable suspicion of felony. See Doug. 359. But if a man actually commit a felony, and another, in whose presence he committed it, attempt to arrest him for it, and be resisted and killed; 2 Hawk. c. 12. s. 1; or if a person, present at an affray, interfere for the purpose of restraining the offenders and keeping the peace, and be killed; 3 Inst. 52. 1 Hawk. c. 31. s. 48. 54. Fost. 310, 311; or if a person, present when another attempts to commit a treason or felony, lay hold of him in order to prevent him, and be killed: 2 Hawk. c. 12. s. 19.: the killing in these cases would be murder, whether the person arresting or interfering, &c. be a constable or not; for either have power to arrest or interfere, &c. in such a case. If a seaman be impressed, and the pressgang be resisted and any of them be killed: if the pressgang at the time were under the direction of a commissioned officer, and such officer were then acting with them, the killing would be murder; otherwise but manslaughter; R. *v.* Broadfoot, Fost. 154; for the presence of a commissioned officer is necessary to the due execution of an impress warrant.

2. As to the legality of the manner in which the authority is exercised: If the constable of the vill of A., attempt without warrant to suppress a tumult in the vill of B., and be resisted and killed, it is manslaughter only; for he had authority, in such a case, within the vill of A. alone. 1 Hale, 459. So, if a sheriff's officer attempt to execute a writ out of the proper county, and be resisted and killed, it is manslaughter only. 1 Hale, 457, et seq. So, if an officer were to attempt the arrest of a man on a Sunday (unless for treason, felony, or breach of the peace, [227] see 29 C. 2. *c. 7. s. 6,) and were resisted and killed, it would be manslaughter only.

3. As to the defendant's knowledge of the deceased's authority or intention: Where an officer is in the legal execution of his duty, or a pri-

vate person endeavouring to suppress an affray, or apprehend a felon, and is resisted and killed: if it appear that the slayer knew the officer's business or the intent of the private person, either expressly from the deceased, or impliedly from circumstances, the killing is murder; if it appear that he was ignorant in this respect, it is manslaughter only. 1 Hawk. c. 31. s. 49, 50. Fost. 310. 1 Hale, 458, &c. Where a bailiff rushed into a gentleman's bedchamber early in the morning, without giving the slightest intimation of his business, and the gentleman, not knowing him, in the impulse of the moment, wounded him with his sword, and killed him: this was holden to be manslaughter. 1 Hale, 470. But where the bailiff or constable shews the warrant, 1 Hale, 461, or where it appears that he is known to the defendant to be an officer, as for instance, when the defendant said "stand off, I know you well enough, come at your peril," R. *v.* Pew. Cro. Car. 183, if after this the officer be killed, it will be murder. If the constable interfere to prevent an affray within his own vill, if he be killed by one of the inhabitants, or other person, who knows him to be the constable, it will be murder; if by a stranger who does not know him, it is manslaughter. So, if one of several know him to be a constable, it will be murder in him, manslaughter in the rest. 1 Hale, 438. If a constable command the peace, 1 Hale, 461, or shew his staff of office, Fost. 311, this it seems is a sufficient intimation of his authority. And in such a case it is not necessary to prove the deceased's appointment as constable; proof that he was accustomed to act as constable, is sufficient. 1 East, P. C. 315. But private persons, when they interfere, must expressly intimate their intention, otherwise killing them will be manslaughter only. Fost. 310, 311. Where the outer door of a dwelling house may be broken open, in order to execute process, (as, for instance, in the case of a capias upon an indictment; 2 Hawk. c. 14. s. 3; a warrant to search for stolen goods; 2 Hale, 151; a capias utlagatum; 2 Hawk. c. 14. s. 6; a warrant of a magistrate for levying a penalty; Id. s. 5; a magistrate's warrant to arrest for any specific crime; Fost. 320. 2 Hawk. c. 14. s. 3. 1 Hale, 584; or where a person, lawfully arrested, escapes into a house; 2 Hawk. c. 14. s. 9; where one known to have committed treason or felony, or to have dangerously wounded another, escapes into a house; Id. s. 7; where an affray is made in a house, and the constable wants to suppress it, or to take the offenders; Id. 6; where there is disorderly drinking or noise in a house, at an unseasonable time of night, particularly in inns, taverns, or alehouses, and the constable or his *watch wish to suppress [228] the disorder; 2 Hale, 95; and in the case of forcible entry or detainer; 2 Hawk. c. 14. s. 6; but not in the execution of writs in civil cases, Fost. 319, excepting writs of seisin, or habere facias possessionem, 5 Co. 91:) in all these cases, before the outer door is broken open, there must be a demand of admittance, or something equivalent thereto, and a refusal, Fost. 320. 136; otherwise, if the officer be killed, it will be manslaughter only.

In all these cases, however, above stated to be manslaughter only, if there be evidence of express malice in the party killing, the homicide will be murder. See R. *v.* Stockley, 1 East, P. C. 310. R. *v.* Curtis, Fost. 135.

Killing by officers.] Where an officer of justice, in endeavouring to execute his duty, kills a man: this is justifiable homicide, or manslaughter, or murder, according to circumstances.

1. Where an officer of justice is resisted in the legal execution of his duty, (see ante, p. 225,) he may repel force by force; and if in doing so

be kill the party resisting him, it is justifiable homicide; and this in civil as well as in criminal cases. 1 Hale, 494. 2 Hale, 118. And the same as to persons acting in aid of such officer. Thus, if a peace officer have a legal warrant against B. for felony, or if B. stand indicted for felony, or, if hue and cry be levied against B.: in these cases, if B. resist, and in the struggle be killed by the officer, or any person acting in aid of him, or joining in the hue and cry, the killing is justifiable. Fost. 318. So, if a private person attempt to arrest one who commits a felony in his presence, or interfere to suppress an affray, and be resisted, and kill the person resisting, this is also justifiable homicide. 1 Hale, 481. 484. Fost. 274. And this, not merely on the principle of self defence, for the officer or private person is not bound to retreat, as in the case of homicide *se defendendo;* 2 Hale, 218; but upon that principle, and the necessity of executing the duty the law has imposed upon him, jointly. Still there must be an apparent necessity for the killing; for if the officer were to kill after the resistance had ceased, 1 East, P. C. 297, or if there were no reasonable necessity for the violence used upon the part of the officer, &c., see R. *v.* Goffe, 1 Vent. 216, the killing would be manslaughter at the least. Also, in order to justify an officer or private person in these cases, it is necessary that they should, at the time, be in the act of legally executing a duty imposed upon them by law, and under such circumstances, that, if the officer or private person were killed, it would have been murder; see ante, p. 225—228; for if the circumstances of the case were such that it would have been manslaughter only to kill the officer or private person, it would be manslaughter at least in the officer or
[229] *private person to kill the party resisting. See Fost. 318. 1 Hale, 490.

2. If the prisoners in a jail, or going to jail, assault the jailer, or officer, and he in his defence kills any of them, it is justifiable, for the sake of preventing an escape. 1 Hale, 496.

3. Where an officer or private person, having legal authority to apprehend a man, attempts to do so, and the man, instead of resisting, flies, or resists and then flies, and is killed by the officer or private person in the pursuit: if the offence with which the man was charged were a treason or felony, or a dangerous wound given, and he could not otherwise be apprehended, the homicide is justifiable; 1 Hale, 481. 2 Hale, 218, 219. 79. 1 Hawk. c. 28. s. 11, 12. Fost. 271; but if charged with a breach of the peace, or other misdemeanor merely, Fost. 271. 1 Hale, 481. 2 Hale, 117, or if the arrest were intended in a civil suit, 1 Hale, 481. Fost 271, or if a pressgang kill a seaman or other person flying from them, R. *v.* Browning, 1 East, P. C. 312, and see Id. 308. 1 Doug. 207, the killing in these cases would be murder,—unless, indeed, the homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel or other weapon not likely to kill, or the like, in which case the homicide, at most, would be manslaughter only. See Fost. 271.

4. If trespassers in forests, parks, chases, or warrens, will not surrender themselves to the keepers, after hue and cry made to stand unto the peace, they may be slain, by virtue of stat. 21 Ed. 1. st. 2. *de malefactoribus in parcis,* if otherwise they could not but escape. And the same indemnity is extended to owners of deer in any inclosed land, and to persons under them, by stat. 3 & 4 W. & M. c. 10. s. 5; and to lords of manors, and to persons authorized by them as gamekeepers, within their respective manors or royalties, in like manner as if the manor, &c. were an ancient chase, by stat. 4 & 5 W. & M. c. 23. s. 4.

5. In case of a riot or rebellious assembly, the officers endeavouring to disperse the mob, are justifiable in killing them, both at common law, 1 Hale, 495. 1 East, P. C. 304, and by the riot act, 1 G. 1. st. 2. c. 5, if the riot cannot otherwise be suppressed. 4 Bl. Com. 179, 180.

6. Where a criminal is executed by the proper officer, in pursuance of his sentence, this is justifiable homicide. 4 Bl. Com. 178. But if it be done by any other person, 1 Hale, 501, or not done in strict conformity with the sentence, as, for instance, if an officer behead one who is adjudged to be hanged, or the contrary, 3 Inst. 52. 1 Hale, 501, it is murder.

**Indictment for Murder, by Shooting.* [230]

Commencement, as ante, p. 210.] Did make an assault; and that the said J. S., a certain pistol, of the value of five shillings, then and there loaded and charged with gunpowder and one leaden bullet, (which pistol he the said J. S. in his right hand then and there had and held,) to, against, and upon the said J. N. then and there feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and that the said J. S., with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder shot and sent forth as aforesaid, the said J. N. in and upon the left breast of him the said J. N. a little above the left pap of him the said J. N., then and there feloniously, wilfully, and, of his malice aforethought, did strike, penetrate, and wound, giving to the said J. N. then and there, with the leaden bullet aforesaid, so as aforesaid shot, discharged, and sent forth out of the pistol aforesaid, by the said J. S., in and upon the said left breast of him the said J. N., a little above the left pap of him the said J. N., one mortal wound of the depth, &c. *as in the last precedent, ante, p.* 210.

For the evidence necessary to support this indictment, see ante, p. 211, et seq.

Indictment for Murder, by Throwing a Stone.

Commencement, as ante, p. 210.] Did make an assault; and that the said J. S. a certain stone, of no value, which he the said J. S. in his right hand then and there had and held, to, against, and upon the said J. N., then and there feloniously, wilfully, and of his malice aforethought, did cast and throw; and that the said J. S. with the stone aforesaid, so cast and thrown by him as aforesaid, the said J. N. in and upon the right side of the head, near the right temple of him the said J. N., then and there feloniously, wilfully, and of his malice aforethought, did strike and wound, giving to the said J. N. then and there, with the stone aforesaid, so as aforesaid, by the said J. S cast and thrown, in and upon the said right side of the head, near the right temple of him the said J. N., one mortal wound of the length of three inches, and of the depth of one inch, &c. &c. *as in the precedent, ante, p.* 210.

For the evidence necessary to support this indictment, see ante, p. 211, et seq.

Indictment for Murder, by Beating.

Commencement, as ante, p. 210.] Did make an assault; and that the said J. S., with both his hands and feet, the said *J. N., [231] to and against the ground, then and there feloniously, wilfully, and of his malice aforethought, did cast and throw; and that the said J.

S., with both the hands and feet of him the said J. S., then and there, and whilst the said J. N. was so lying upon the ground, the said J. N., in and upon the head, stomach, back, and sides of him the said J. N., then and there feloniously, wilfully, and of his malice aforethought, did strike, beat, and kick, giving to the said J. N. then and there, as well by the casting and throwing of him the said J. N. to the ground as aforesaid, as also by striking, beating, and kicking the said J. N. in and upon the head, stomach, back, and sides of him the said J. N., with both the hands and feet of him the said J. S., in manner aforesaid, several mortal bruises in and upon the head, stomach, back, and sides of him the said J. N.; of which said several mortal bruises, &c. as in the precedent, ante, p. 210, &c.

For the evidence necessary to support this indictment, see ante, p. 211, et seq.

Indictment for Murder, by Riding Over the Deceased.

Commencement, as ante, p. 210.] Did make an assault; and that the said J. S., then and there riding upon a certain horse, of the price of twenty pounds, the said horse in and upon the said J. N., then and there feloniously, wilfully, and of his malice aforethought, did ride and force, and him the said J. N., with the horse aforesaid, then and there, by such riding and forcing, feloniously, wilfully, and of his malice aforethought, did cast and throw to the ground; by means whereof the said horse, with his hinder feet, him the said J. N., so cast and thrown to and upon the ground as aforesaid, in and upon the hinder part of the head of him the said J. N. then and there did strike and kick, thereby then and there giving unto the said J. N., in and upon the said hinder part of the head of him the said J. N., one mortal fracture and contusion, of which said mortal fracture and contusion, he the said J. N. then and there instantly died; and so the jurors, &c. &c. as in the precedent, ante, p. 210, &c.

For the evidence necessary to support this indictment, see ante, p. 211, et seq.

Indictment for Murder, by Strangling.

Commencement, as ante, p. 210.] Did make an assault, and that the said J. S., a certain silk handkerchief, of the value of one shilling, about the neck of him the said J. N. then and there feloniously, wilfully, and of his malice aforethought, did fix, tye, and fasten; and that the said J. S., with the silk handkerchief aforesaid, him the said J. N. then
[232] and there *feloniously, wilfully, and of his malice aforethought, did choak, suffocate and strangle: of which said choaking, suffocation, and strangling, he the said J. N., then and there instantly died: and so, &c. &c. as in the precedent, ante, p. 210, &c.

For the evidence necessary to support this indictment, see ante, p. 211, et seq.

Indictment for Murder, by Drowning.

Commencement, as ante p. 210.] Did make an assault; and that the said J. S. then and there feloniously, wilfully, and of his malice aforethought, did take the said J. N. into both the hands of him the said J. S., and then and there feloniously, wilfully, and of his malice aforethought, did cast, throw, and push the said J. N. into a certain pond there situate,

wherein there was a great quantity of water; by means of which said casting, throwing, and pushing of the said J. N. into the pond aforesaid, by the said J. S., he the said J. N., in the pond aforesaid, with the water aforesaid, was then and there choaked, suffocated, and drowned; of which said choaking, suffocation, and drowning, he the said J. N. then and there instantly died: and so, &c. &c. as in the precedent, ante, p. 210.

For the evidence necessary to support this indictment, see ante, p. 211, et seq.

Indictment for Murder, by Starving.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S. late of the parish of B., in the county of M., carpenter, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought, contriving and intending one J. N., then being an apprentice to him the said J. S., feloniously to starve, kill, and murder, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, and on divers days and times between that day and the twenty-eighth day of the same month, in the same year, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said J. N., his apprentice as aforesaid, in the peace of God and of our said lord the King then and there being, feloniously, wilfully, and of his malice aforethought, did make divers assaults; and that the said J. S. on the said third day of May, in the year last aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. N. in a certain room in the dwelling house of him the said J. S. there situate, feloniously, wilfully, and of his malice aforethought, did secretly confine and imprison; and that the said J. S. from the said third day of May, in the year last aforesaid,, until the twenty-eighth day of the same month, in *the same year, at the [233] parish aforesaid, in the county aforesaid, feloniously, wilfully, and of his malice aforethought, did neglect, omit, and refuse to give and administer, and to permit and suffer to be given and administered to him the said J. N., sufficient meat and drink necessary for the sustenance, support, and maintenance of the body of him the said J. N; by means of which said confinement and imprisonment, and also of such neglecting and refusing to give and administer, and to permit and suffer to be given and administered, such meat and drink as were sufficient and necessary for the sustenance, support, and maintenance of the body of him the said J. N,, he the said J. N., from the said third day of May, in the year last aforesaid, until the twenty-eighth day of the same month, in the same year, at the parish aforesaid, in the county aforesaid, did languish, &c. &c. as in the precedent, ante, p. 210.

The evidence is the same as that mentioned, ante, p. 211, et seq. but in addition to it you must prove that J. N. was the apprentice of J. S., or, at least, acted as such.

Indictment for Murder, by Poison.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought, wickedly contriving and intending one J. N., with poison, wilfully, feloniously, and of his malice aforethought to kill and murder, on the third day of May, in

sent at the time of the birth, R. *v.* Peat, 1 East, P. C. 229, or if the mother called for help, or had previously confessed her pregnancy, Id. 228, these circumstances were holden to negative the concealment; and they might probably have the same effect under the present statute, 43 G. 3. c. 58. If the prisoner made provision for the birth of her child, this also might be deemed a circumstance indicative of her intention not to conceal it. 1 East, P. C. 228.

Indictment for administering drugs, to procure abortion, the woman not being quick with child.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, feloniously, wilfully, and maliciously did administer to, and cause to be administered to and taken by one A. N., a large quantity of a certain drug called savin, to wit, two ounces of the said drug, with intent then and there and thereby to cause and procure the miscarriage of the said A. N., she the said A. N., at the time of the administering and taking the said drug as aforesaid, being with child, but not quick with child, to wit, at the parish aforesaid, in the county aforesaid: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. Add a second count, substituting for the words, "being with child but not quick with child," the words "not being quick with child." Add also another set of counts, charging the defendant with having administered, &c. "a large quantity of a certain mixture to the jurors aforesaid unknown," lest you should fail in proving the drug really administered to be savin.

Felony, imprisonment or whipping or both, or transportation for not more than 14 years. 43 G. 3. c. 58. s. 2. *The statute extends to the administering any "medicines, drug, or other substance or thing whatsoever," or the using "any instrument, or other means whatsoever," with intent to cause the miscarriage of any woman not quick with child.*

Evidence.

To support this indictment, it must be proved that the defendant administered or caused to be administered or taken, a quantity of savin, or a mixture of some kind; and that he did this, with intent to
[237] procure the miscarriage of A. N. It is *immaterial, whether in fact the drug or other thing administered, were likely or calculated to cause abortion, or whether A. N. were even with child at the time, or not; it is sufficient to prove that the defendant, imagining her to be with child, administered the drug, &c. *with intent* to procure miscarriage. R. *v.* Phillips, 3 Camp. 74. Where the indictment charged the defendant with having administered a *decoction* of savin, proof that he administered an *infusion* of savin, was holden to maintain the indictment. Id. If it turn out, in evidence, that the woman was quick with child, at the time the drug, &c. was administered, it should seem that the defendant must be acquitted: for this section of the act expressly extends to cases only where the drug is administered to women "not being, or not being proved to be, quick with child" at the time.

Indictment for the like, if the woman were quick with child.

Commencement, as in the last precedent.] Feloniously, wilfully, maliciously, and unlawfully did administer to, and cause to be administered to and taken by one A. N., (the said A N. then and there being one of his said Majesty's subjects) a large quantity of a certain* noxious and destructive substance called savin, to wit, two ounces of the said substance called savin, with intent then and there and thereby to cause and procure the miscarriage of the said A. N., she the said A. N., at the time of the administering and taking the said substance as aforesaid, being quick with child, to wit, at the parish aforesaid, in the county aforesaid: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. If there be any doubt as to the drug administered, it may be prudent perhaps to state it in different ways, in several counts; and add a count for administering, &c. "a certain noxious and destructive substance, to the jurors aforesaid unknown," with the like intent.

Felony, death. 43 G. 3. c. 58. s. 1. *The words in the act are* "any deadly poison, or other noxious and destructive substance or thing."

Evidence.

To support this indictment, it must be proved:

1. That the defendant administered, or caused to be administered to, or taken by A. N., the drug, &c. mentioned in the indictment; or perhaps proof of any other substance or thing, *ejusdem generis*, would be sufficient, as in the case of murder. See ante, p. 211, and see R. *v.* Phillips, 3 Camp. 74. It is not sufficient, however, that the defendant merely imagined that it would have the effect intended, as in a case under the second section of the statute; *vide supra;* but it must also appear *that the drug administered was either a "deadly poi- [238] son," or a "noxious or destructive substance or thing."

2. It must be proved, that the drug in question was administered with intent to procure the miscarriage of A. N. Whether it were in fact a drug likely or calculated to produce that effect, seems to be immaterial, provided the intent be proved.

3. It must be proved, that the woman was quick with child at the time of the offence committed. In a case where the woman herself gave evidence, and swore that she had not felt the child alive within her, Lawrence, J. held that this evidence took the case out of the statute, although the witness also swore that she was in the fourth month of her pregnancy at the time, and medical persons proved that the child is usually alive at that period. R. *v.* Phillips, 3 Camp. 77.

Indictment for an Attempt to Poison.

Proceed as in the last precedent, to the mark, and then thus:*] deadly poison called white arsenic, to wit, two drachms of the said white arsenic, [or you may state it as in the last precedent, if the drug be not a deadly poison,] with intent then and there and thereby, feloniously, wilfully, maliciously, unlawfully, and of his malice aforethought, the said A. N. to poison, kill, and murder: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 43 G. 3. c. 58. s. 1.

Evidence.

The evidence is the same as upon an indictment for murder by poison, excepting, of course, that the prosecutor's death is not proved to have taken place at all, or at least not until after the year and day from the time of administering the poison.

SECT. 2.

MANSLAUGHTER.

Indictment for Manslaughter.

The form of the indictment for manslaughter, in ordinary cases, is the same as in an indictment for murder, omitting the words "of his malice aforethought" throughout, and the word "murder," in the latter part of it. The evidence is also the same, with this exception: that in murder, the prosecutor need only prove the homicide, without going into evidence of the circumstances under which it was committed; in [239] *manslaughter, he must give evidence of all the facts of the case, so as to prove the homicide to be manslaughter. As to the cases in which a homicide amounts to manslaughter only, and not to murder, see ante, p. 214, et seq.

Manslaughter is a felony within clergy, and punishable with burning in the hand, (or fine, and imprisonment not exceeding a year) and forfeiture of goods and chattels.

Indictment for Manslaughter, by Stabbing.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. N., in the peace of God and of our lord the King then and there being, feloniously did make an assault; and that the said J. S., with a certain drawn sword, of the value of three shillings, which he the said J. S. in his right hand then and there had and held, the said J. N. in and upon the left side of the belly, between the short ribs of him the said J. N., then and there feloniously did strike, stab, and thrust, (the said J. N. then and there not having any weapon drawn, and not having then and there first stricken the said J. S.;) and that the said J. S., with the sword aforesaid, to the said J. N., in and upon the left side of the belly, between the short ribs of him the said J. N., one mortal wound of the breadth of three inches, and of the depth of six inches, then and there feloniously did give; of which said mortal wound the said J. N., from the said third day of May, in the year aforesaid, until the fifteenth day of the same month, in the same year, at the parish aforesaid, in the county aforesaid, did languish, and languishingly did live; on which fifteenth day of May, in the year aforesaid, the said J. N., at the parish aforesaid, in the county aforesaid, of the said mortal wound died: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., the said J. N. in manner and

form aforesaid, feloniously did kill and slay: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *The indictment in this case usually concludes, against the form of the statute; but this does not seem to be necessary. See* 1 *Hale*, 468.

Felony, death. 1 J. 1. c. 8. s. 2. *A prosecution on this statute, however, very rarely occurs in practice.*

Evidence for the prosecution.

With a certain drawn sword.] This is proved in the same *manner as in murder. It must, however, appear to have been such a weapon as was likely, and calculated to produce that "stab or thrust," intended by the statute. *Vide infra.* [240]

Feloniously.] In R. *v.* Buckner, Sty. 467, Glyn C. J. said that malice must be proved, in order to bring a case within this statute. But this seems to be a mistake; for the statute takes away clergy from a homicide under these circumstances, "although it cannot be proved that the same was done of malice aforethought."

Did strike, stab, and thrust.] The words in the statute are, "stab or thrust;" and these have been holden to include not only a stabbing or thrusting with a sharp instrument, but also a thrust with a blunt weapon, Fost. 300, or an incised wound with any instrument. See 1 Hale, 470. Killing with a blow of a hammer, 1 Hawk. c. 30. s. 8, or the like, is not within the act; and it is even doubted if shooting be within it. 1 Hale, 469, 470. But it is quite clear that a killing, by throwing a hammer, R. *v.* Williams, 1 Hale, 468. W. Jon. 432, or even a sword or other pointed weapon, R. *v.* Newman, 1 East, P. C. 248, or other instrument, at a man, at least at any distance from him, is not within the act.

The said J. N. not having any weapon drawn.] This must be proved. If the party slain had a sword, or even a cudgel in his hand at the time, or had thrown a pot or bottle, or discharged a pistol at the party stabbing, it would be sufficient to take the case out of the statute; 1 Hawk. c. 30. s. 8. R. *v.* Hunter, 3 Lev. 255; but it must be something likely to do the defendant an injury, and not merely a riding switch or cane, 1 Hale, 470, or the like.

And not having first stricken, &c.] This must also be proved; for if the deceased had struck J. S. at all, before the fatal wound was given, this takes the case out of the statute, even although J. S. may really have given the first blow. Fost. 301. 1 Hawk. c. 30. s. 6. So, if two or more attack J. S., and one only of them strike him, and he thereupon stab one of the others, this will take the case out of the statute. R. *v.* Buckner, Sty. 467.

And lastly, it must be proved that the deceased died of the wound within six lunar months from the time he received it. 1 J. 1. c. 8. s. 2.

If the prosecutor fail in the proof of any of the circumstances necessary to bring the case within the statute, still the defendant may be found guilty of the manslaughter at common law.

**Evidence for the defendant.* [241]

The defendant must prove either that he is not guilty of the homicide at all, or that it is only manslaughter at common law, or homicide *se defendendo*, or by misadventure.

By the third section of the statute, it is provided, that the act shall not

extend to any person who shall kill another *se defendendo*, or by misfortune, or in any other manner than is aforesaid; nor to any person who, in keeping and preserving the peace, shall chance to commit manslaughter, so as the same shall not be committed wittingly, willingly, and of purpose, under pretext and colour of keeping the peace; nor shall it extend to any person, who in chastising or correcting his child or servant, shall, beside his intent and purpose, chance to commit manslaughter. Also, it has been holden, that when a man stabs another whom he finds in the act of adultery with his wife, 1 Hale, 486, or where a man is assaulted by thieves in his house, and kills one of them. 1 Fost. 298.. or where a man killed a bailiff, who rushed into his bedroom early in the morning, and whom he did not know to be an officer: 1 Hale, 470: these cases are not within the act.

Sect. 3.

ASSAULT.

Indictment for a Common Assault.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. N., in the peace of God and our lord the King then and there being, did make an assault, and him the said J. N. then and there did beat, wound, and ill treat; and other wrongs to the said J. N. then and there did: to the great damage of the said J. N., and against the peace of our lord the King, his crown and dignity. *If the assault were committed under circumstances of aggravation, you may state them.*

Misdemeanor, punishable with fine or imprisonment, or both.

Evidence for the prosecution.

Did make an assault.] An assault is an attempt to commit a forcible crime against the person of another: such as an attempt to com-
[242] mit a battery, murder, robbery, rape, &c. The *present is an indictment for an attempt to commit a battery, and also for a battery actually committed; and if the prosecutor prove either, the defendant must be convicted. Striking at another with a cane, stick, or fist, although the party striking misses his aim; 2 Ro. Abr. 545. l. 45: drawing a sword or bayonet, or throwing a bottle or glass, with intent to wound or strike; presenting a gun at a man who is within the distance to which the gun will carry; pointing a pitchfork at him, when within reach of it; or any other act indicating an intention to use violence against the person of another, is an assault. 1 Hawk. c. 62. s. 1. Mere words, however, can never amount to an assault. Id. So, if a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault. Com. Dig. Battery, C.

Did beat, wound, and ill treat.] A battery, in the legal acceptation of the word, includes beating and wounding. To beat, also in the legal acceptation of the term, means not merely to strike forcibly with the hand, or

a stick, or the like, but includes every touching (however trifling) of another's person, in an angry, revengeful, rude, or insolent manner: 1 Hawk. c. 62. s. 2: as, for instance, thrusting or pushing him, in anger; Per Holt. C. J. 6 Mod. 149; holding him by the arm; spitting in his face; 6 Mod. 172; jostling him out of the way; 6 Mod. 149; pushing another man against him; Bul. N. P. 16; throwing a squib at him; 2 W. Bl. 892; striking a horse upon which he is riding, whereby he is thrown; 1 Mod. 24. W. Jon. 444; or the like. If a man strike at another with a cane or fist, or throw a bottle at him, or the like: if he miss him, it is an assault; *Vide supra;* if he hit him, it is a battery. A wounding is where the violence is so great as to draw blood, by striking or stabbing with sword, knife, or other instrument; or by shooting, or by striking with a cudgel, or fist, or the like.

And other wrongs.] Under the *alia enormia*, you may give in evidence any circumstance of aggravation attending the assault and battery, not of itself amounting to a distinct trespass. 2 Phil. Ev. 136.

Evidence for the defendant.

The defendant must prove, either that he is not guilty at all; or that the facts of the case do not amount to an assault or battery; or that he was justified or excused in law, in what he did. The two first defences are always given in evidence under the general issue, both in civil and criminal cases; matter of justification or excuse, is specially pleaded in civil *actions, but always given in evidence under the [243] general issue in criminal cases.

1. It is a good defence to prove that the alleged battery happened by misadventure. If a horse run away with his rider, and run against a man, it is no battery. Gibbons *v.* Pepper, 2 Salk. 637. If a soldier, in his ranks, discharge his gun, and a man unexpectedly pass before him at the time, and be hurt by it, it is no battery. Moor, 864. Hob. 134. and see R. *v.* Gill. 1 Str. 490. And there are many cases of accidents which cannot be set up as a defence in an action for a battery, that would certainly be a good defence upon an indictment: in civil cases, the accident must have been inevitable, to operate as an excuse; 2 Ro. Abr. 548. G. Hob. 134. Moor, 864. and see Str. 596; but in criminal cases, it may be deemed a general rule, that the same facts which would make a killing homicide by misadventure, see ante, p. 214, &c. will be a good defence upon an indictment for a battery.

2. It is a good defence to prove that the alleged battery was merely an amicable contest: as, that he wrestled with the prosecutor for a wager. Com. Dig. Pleader, 3 M. 18. So, that it happened by accident whilst the defendant was engaged in some sport or game, which was neither unlawful nor dangerous, see ante, p. 223, is a good defence.

3. It is a good defence to prove that the alleged battery was merely the correcting of a child by his parent, the correcting of a servant or scholar by his master, or the punishment of a criminal by the proper officer, Com. Dig. Pleader, 3 M. 19. 1 Hawk. c. 60. s. 23. c. 62. s. 2, and see 2 B. & P. 224, provided the correction be moderate, in the manner, the instrument, and the quantity of it, or that the criminal be punished in the manner appointed by law. See ante, p. 221. 229. It has been holden that the defendant may justify even a maihem, if done by him as a military officer, for disobedience of orders. Lane *v.* Degberg. Bul. N. P. 19.

4. It is a good defence, in justification even of a wounding or maihem,

to prove that the prosecutor assaulted or beat the defendant first, and that the defendant committed the alleged battery merely in his own defence; 1 Sid. 246. 1 Ro. Rep. 19. 2 Salk. 642. 3 Salk. 46; if he prove an assault merely, as, for instance, that the prosecutor lifted up his staff and offered to strike him, it is sufficient to justify the defendant's striking him; for he need not, in such a case stay till the other has actually struck him. Bul. N. P. 18. 2 Ro. Abr. 547. l. 37. So, a husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. 2 Ro. Abr. 546. D. 1 Hawk. c. 60. s. 23, 24. But in all these cases, the battery must be such only as was necessary to the defence of the
[244] party *or his relation; for if it were excessive, if it were greater than was necessary for mere defence, the prior assault will be no justification. Bul. N. P. 18. Also, it will be a sufficient answer to this defence, to prove that the first assault was justifiable. Com. Dig. Pleader, 3 M 15. 1 Salk. 407 Carth. 280.

5. The defendant may justify a battery, by proving that he committed it in defence of his possession; as, for instance, to remove the prosecutor out of his close or house. Lutw. 1435. Hardw. 358, or to prevent him from entering it, 2 Ro. Abr. 548. l. 25, to restrain him from taking or destroying his goods, &c., 2 Ro. Abr. 549. l. 7, from taking or rescuing cattle, &c. in his custody upon a distress, Id. l. 10. 2 Bro. Ent. 260, or the like. In the case of a trespass in law, merely, without actual force, the owner of the close, &c. must first request the trespasser to depart, before he can justify laying his hand on him for the purpose of removing him; and even if he refuse, he can only justify so much force as is necessary to remove him. 8 T. R. 299. See 2 Ro. Abr. 548. l. 35. 45. 2 Salk. 641. But if the trespasser use force, then the owner may oppose force to force; 2 Salk. 641. 8 T. R. 78; and in such a case, if he be assaulted or beaten, he may justify even a wounding or maihem, in self defence, as above mentioned. In answer, however, to a justification in defence of his possession, the other party may prove that the battery was excessive, Skin. 387. Lutw. 1436, or justify the alleged trespass on the defendant's possession, by proving that he had a right of way over the close, or the like.

6. It is a good defence to prove that the defendant, as an officer of justice, arrested the prosecutor by virtue of a certain writ or process, which is the alleged battery complained of. 2 Ro. Abr. 546. A. A sheriff's officer, however, can only justify laying his hand upon a man, in order to arrest him upon a writ or process; unless he resist, or an attempt be made to rescue him. 1 L. Raym. 229. 2 Str. 1049; and even then, he can justify no greater degree of force than was necessary in order to secure his prisoner. And the same as to officers of justice, and persons acting in their aid, arresting on suspicion of felony, without warrant; and as to private persons arresting men committing felonies in their presence. See ante, p. 228. So, a man may justify laying his hand upon another to prevent him from fighting, or committing a breach of the peace. Com. Dig. Pleader, 3 M. 16; or to prevent him from rescuing goods taken in execution, 3 Lev. 113, or the like. See 1 Mod. 168. 2 Ro. Abr. 546. l. 40. Yet even in these cases he must not use more force than is requisite to restrain the other party; otherwise he cannot avail himself of the threatened breach of the peace, &c. as a justification.

*Indictment for an Aggravated Assault.

Commencement, as ante, p. 241.] In and upon one J. N., in the peace of God and our lord the King then and there being, did make an assault, and him the said J. N. then and there did beat, wound, and ill treat; and that the said J. S., with both his hands then and there violently cast, flung, and threw the said J. N. to, upon, and against a certain brick floor there, and him the said J. N. in and upon his head, neck, breast, back, sides, and other parts of his body, with both the feet of him the said J. S. then and there violently and grievously did kick, strike, and beat, giving to the said J. N. then and there, as well by such flinging casting, and throwing of him the said J. N., as also by such kicking, striking, and beating of the said J. N. as aforesaid, in and upon the head, neck, breast, sides, back, and other parts of the body of him the said J. N., divers bruises, hurts, and wounds, so that his life was greatly despaired of; and other wrongs, &c. as in the precedent, ante, p. 241. Add a count for a common assault. Ante, p. 241.

As to the evidence, See ante, p. 242, et seq.

Indictment for Assaulting a Woman quick with Child.

Commencement as ante, p. 241.] In and upon A., the wife of J. N., in the peace of God and our lord the King then and there being, and also, then and there being quick with child, did make an assault, and her the said A. then and there did beat, wound, and ill treat, so that her life was greatly despaired of, and by reason whereof, she the said A., afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, did bring forth the said child dead; and other wrongs, &c. as in the precedent, ante, p. 241. Add a count for a common assault.

As to the evidence, see ante, p. 242, et. seq. *If the child were born alive, and died afterwards of the injuries received by it when the mother was beaten, the offence would be murder.*

Indictment for an Assault with intent to Murder.

Commencement, as ante, p. 241.] With a certain iron bar which he the said J. S. in his right hand then and there had and held, in and upon one J. N., in the peace of God and our lord the king then and there being, did make an assault, and him the said J. N. with the said iron bar then and there did beat and wound, with intent him the said J. N. then and there feloniously, wilfully, and of his malice aforethought, to kill and murder; and other wrongs, &c. as ante, p. 241. Add a count for a common assault.

*To maintain the first count, the assault must be such, that if [246] death had ensued it would have been murder. R. *v.* Mitton, 1 East, P. C. 411. Hence the necessity of the second count.

Indictment for Stabbing with intent to Murder.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. N., a subject of our said lord the King then and there being, feloniously, wilfully, maliciously, and unlaw-

fully did make an assault; and with a certain knife, which he the said J. S. in his right hand then and there had and held, the said J. N. in and upon the right side of the belly, between the short ribs of him the said J. N., then and there feloniously, wilfully, maliciously, and unlawfully did strike, stab, and cut, with intent in so doing, wilfully, and of his malice aforethought, to kill and murder the said J. N.: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*2d count.*) And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S., afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, [*&c. as in the last count;*] with intent, in so doing, to disfigure him the said J. N.: against the form of the statute, &c. (*3d count,*) *same as the last*; with intent in so doing, to disable him the said J. N.: against the form, &c. (*4th count,*) same as the last; with intent, in so doing, to do some grievous bodily harm to him the said J. N.: against the form, &c. *You may add other counts, when necessary, charging the offence to have been committed with intent to rob, or with intent to obstruct, resist, or prevent the apprehension of J. S., or any of his accomplices, for an offence for which they might lawfully be apprehended or detained.*

Felony, death. 43 G. 3. c. 58.

Evidence.

Feloniously, wilfully, and maliciously, &c.] The offence must be proved to have been committed under such circumstances, that if death had ensued it would have been murder; otherwise the defendant must be acquitted. 43 G. 3. c. 58. See ante, p. 214, &c.

With a certain knife, &c.] This is proved in the same manner
[247] as in murder. See ante, p. 211, &c. It must appear, *however, to have been such an instrument as was calculated to inflict an incised wound.

In and upon the right side, &c.] This is proved as in murder. See ante, p. 211.

Did strike, stab, and cut.] An incised wound must be proved; a mere contused or lacerated wound is not within this clause of the act. 1 Russel, 859.

The statute extends to three species of assaults: namely, 1. To "shoot at" any of his Majesty's subjects; 2. To "present, point, or level any kind of loaded fire arms, and attempt by drawing a trigger, or in any other manner, to discharge the same," at or against him; 3. To "stab or cut" him. And each of these may be done with any of the following intents: namely, 1. To murder; 2. To rob; 3. To maim; 4. To disfigure; 5. To disable; 6. To do some grievous bodily harm; 7. To prevent the lawful apprehension or detention of the defendant, or of some of his accomplices, for an offence for which they might lawfully be apprehended or detained.

With intent, &c.] The intent must be proved as laid; hence the necessity of several counts, charging the offence to have been committed with different intents. The intent, of course, can be proved by presumptive evidence only. See ante, p. 78. 65. Where the intent charged is to prevent apprehension, &c., it must be proved that the party who attempted to apprehend the defendant, &c., was legally authorized to do so, R. *v.* Dyson, 1 Stark. Rep. 246, and that the defendant was apprised of his intent. R. *v.* Ricketts, 3 Camp. 68.

Indictment for Shooting at a person, with intent to Murder.

Commencement, as in the last precedent.] In the county aforesaid, with a certain gun, then and there loaded with powder and divers leaden shot, which he the said J. S. in both his hands then and there had and held at and against one J. N., a subject of our said lord the King then and there being, feloniously, wilfully, maliciously, and unlawfully did shoot, with intent, &c. *as in the last precedent. Add a count on the Black Act, as in the precedent, post, p. 248; and a set of counts framed from the next precedent, if it be doubtful whether the gun actually went off.*

Felony, death. 43 G. 3. c. 58.

Evidence.

Prove that J. S. shot at J. N. with a gun or pistol, &c. as in murder; and prove this to have been done under such *cir- [248] cumstances, that if death had ensued it would have been murder. Prove the intent as laid in some one of the counts. *Vide Supra.*

Indictment for levelling a Pistol at a person, with intent to Murder.

Commencement, as ante, p. 246.] In the county aforesaid, certain loaded fire arms, to wit, a certain pistol then and there loaded with powder and one leaden bullet, at and against one J. N., a subject of our said lord the King then and there being, feloniously, wilfully, maliciously, and unlawfully did present, point, and level, and did then and there, by drawing the trigger of the said pistol, feloniously, wilfully, maliciously, and unlawfully attempt to discharge the same at and against the person of the said J. N.; with intent, &c. *as in the precedent*, ante, p. 246.

Evidence.

Prove that the defendant presented a pistol or gun at J. N., and attempted, by pulling the trigger, to discharge it at him; and prove this to have been done under such circumstances that if death had ensued it would have been murder. Prove the intent as under the last two precedents.

Indictment on the Black Act, for Shooting at Another.

Commencement, as ante, p. 246.] In the county aforesaid, with a certain gun then and there loaded with powder and divers leaden shot, which he the said J. S. in both his hands then and there had and held, feloniously, wilfully, and maliciously did shoot at one J. N., he the said J. N. being then and there in a certain dwelling house of him the said J. N. [*or* in a certain place and King's highway called Fleet Street] there situate: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *The venue may be laid in any county, at the option of the prosecutor.* Ante, p. 3.

Felony, death. 9 G. 1. c. 22. s. 1. *The words of the statute are: "or shall wilfully and maliciously shoot at any person in any dwelling house or other place."*

Evidence.

1. Prove that the defendant discharged a loaded gun or pistol at J. N. Where a man, imagining that another was passing through a particular part of a hedge, fired in that direction, when in fact the man [249] had passed through the hedge in an *opposite direction: this was holden not to be within the statute. R. *v.* Empson, 1 Leach, 224.

2. The place where J. N. is alleged to have been at the time, is matter of local description, and must be proved as laid. See ante, p. 14, 15. 62. Therefore, if the place were alleged in the indictment to be the house of A., and it appeared in evidence to be the house of B., the variance would be fatal. R *v.* Durour, 1 Leach, 351. It may very well be doubted, however, if it be necessary to specify any place in the indictment, for the statute says, "dwelling house *or other place;*" but being alleged, it must it seems be proved as laid. Id. *sed qu.*

3. The offence must be proved to have been committed under such circumstances, that if death had ensued, it would have been murder. R. *v.* Gastineaux, 1 Leach, 417.

Indictment for Slitting a Nose.

Commencement, as ante, p. 246.] In the county aforesaid, in and upon one J. N., a subject of our lord the King, in the peace of God and of our said lord the King then and there being, on purpose and of malice aforethought, and by lying in wait, feloniously and unlawfully did make an assault; and that he the said J. S., with a certain knife, which he the said J. S. in his right hand then and there had and held, the nose of the said J. N., on purpose and of his malice aforethought, and by lying in wait, then and there unlawfully and feloniously did slit, with intention in so doing, the said J. N. in manner aforesaid to maim and disfigure: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 22 & 23 C. 2. c. 1. s. 7. *The statute extends to cutting out or disabling the tongue, putting out an eye, slitting the nose or lip, and cutting off or disabling any limb or member of any subject of his Majesty, with intent to maim or disfigure.*

Evidence.

On purpose and of malice aforethought.] This offence must be committed under such circumstances, that if death had ensued it would have been murder.

By lying in wait.] This does not imply concealment, but merely that the defendant waited in some particular place for the prosecutor, intending to wound or maim him as soon as he should arrive. Where a gentleman apprehended a boy picking his pocket, and whilst taking him along the street, one of the boy's accomplices passed a little way before the gentleman, and waiting until he came up, gave him a blow [250] of a knife across *the face, saying, "Damn you, Sir, let the boy go:" this was holden to be a lying in wait. R. *v.* Carrol et al. 1 East, P. C. 394. Where a carter, passing along the street with his cart loaded, was attacked by a gang of thieves, whom he at that time succeeded in beating off; but in passing with his cart loaded, by the same place, on the following evening, he was attacked by several persons, and upon

some of them crying out to others, "Damn you, where are your knives," the prisoner immediately wounded the carter in the face with a large knife; and at the trial the carter said that he could assign no motive for the attack, but revenge for his having beaten off the thieves the evening before, for they did not rob the cart when they attacked him the second time: this was holden to be a lying in wait. R. *v.* Mills, 1 Leach, 259. But where a farmer's servant caught the defendant stealing turnips in his master's field, and the defendant immediately struck him with a knife, and slit his nose, this was holden not to be within the statute, as there was no lying in wait. R. *v.* Tickner, 1 Leach, 187, and see R. *v.* Mackey et al. 1 East, P. C. 399.

With a certain knife, &c.] This is proved as in murder. See ante, p. 211.

The nose of the said J. N. did slit.] A wound across the nose, so deep as to render the bone visible. R. *v.* Carrol et al. 1 Leach, 55, or which went through into the nostril, but the edge of the nostril was not cut through. R. *v.* Coke et al. 6 St. Tr. 212, has been holden to be a slitting of the nose within the meaning of this act.

With intention to maim and disfigure, &c.] In the case of R. *v.* Coke and Woodburn, 6 St. Tr. 212, the defendants had the effrontery to set up as a defence, that the assault was committed by them with intent, not to maim or disfigure, but to murder; the court however held, that if a man attack another with intent to murder him, with an instrument which cannot but endanger the disfiguring of him, and in such attack happen not to kill, but only to disfigure him, it is within the statute. The defendants were accordingly convicted and executed. 4 Bl. Com. 207 n.

Indictment for an Assault on account of Money Won at Play.

Commencement, as ante, p. 241] Did beat, wound, and ill treat, on account of certain money before that time, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, won by the said J. N. of the said J. S., by then and there gaming, playing, and betting at a certain game of cards called *rouge et noir*: to the great damage of the said J. N.: against the form of the statute in such case made and provided, and *against the peace of our lord the King, his crown [251] and dignity. *If it be doubtful at what game they played, add a count omitting the name of the game. Add also a count for a common assault, as ante, p.* 241.

Forfeiture of goods and chattels, and two years imprisonment. 9 Ann. c. 14. s. 8.

Evidence.

Prove the assault, as directed ante, p. 241, et seq.; and prove it to have been committed on account of money won at play, as alleged in the indictment. It is immaterial whether the assault took place at the time the parties were gaming, or afterwards, provided it be proved to have been committed on account of the money won at play. R. *v.* Darley, 4 East, 174.

Indictment for Assaulting a Constable in the Execution of his Office.

Commencement, as ante, p. 241.] In and upon one J. N. (then being one of the constables of the said parish of B. in the county aforesaid, and

in the due execution of his said office then and there being) did make an assault, and him the said J. N., so being in the due execution of his said office as aforesaid, then and there did beat, wound, and ill treat; and other wrongs, &c. as in the precedent, ante, p. 241. Add a count for a common assault, as ante, p. 241. From this precedent an indictment may readily be framed for an assault upon any other public officer in the execution of his office.

Evidence.

Prove an assault or battery, as directed ante, p. 241. It is not necessary to prove J. N.'s appointment as constable; proof that he was accustomed to act as such, will be sufficient. Ante, p. 227. 1 East, P. C. 315. Per Buller, J. 4 T. R. 366, and see Arch. Pl. & Ev. 352. Prove, however, that he was in the legal execution of his office at the time he was assaulted.

Indictment for Assaulting a Gamekeeper in the Execution of his Duty.

Commencement, as ante, p. 241.] At the parish aforesaid, in the county aforesaid, and within a certain manor called ———, there situate, in and upon one J. N. (then being gamekeeper of the said manor, duly deputed, authorized, and appointed by G. H. Esquire, then and yet lord of the said manor) in the due execution of his said office of game-
[252] keeper of the said manor *then and there being, did make an assault, and him the said J. N., so being in the execution of his said office as aforesaid, then and there did beat, wound, and ill treat; and other wrongs, &c. as in the precedent, ante, p. 241. Add a count for a common assault.

The evidence may be similar to that required to support the last precedent.

Indictment for Assaulting a Collector of a Turnpike, in the Execution of his Office.

Commencement, as ante, p. 241.] In and upon one J. N. (then and there being one of the collectors and receivers of the monies payable by virtue of a certain act of parliament, made in the thirteenth year of the reign of his late Majesty King George the Third, intituled "An act to explain, amend, and reduce into one act of parliament, the general laws now in being for regulating the turnpike roads in that part of Great Britain called England, and for other purposes") in the due execution of his office of collector and receiver of the said monies then and there being, did make an assault, and him the said J. N., so being in the execution of his said office as aforesaid, then and there did beat, wound, and ill treat; and other wrongs, &c. as in the precedent, ante, p. 241. Add a count for a common assault.

The evidence may be similar to that required to support the last two precedents.

Indictment for an Assault, with intent to Spoil the Clothes of another.

Commencement, as ante, p. 241.] In a certain public street and highway there situate, called Holborn, in and upon one A. N., in the peace of God and of our lord the King then and there being, feloniously, wil-

fully, and maliciously did make an assault, with intent the garments and clothes of her the said A. N. wilfully and maliciously to tear, spoil, cut, and deface; and that the said J. S., certain garments and clothes, to wit, one silk gown of the value of thirty shillings, and one cotton shawl of the value of ten shillings, the clothes, garments, goods and chattels of the said A. N., and on the person of the said A. N. then and there in wear being, then and there, in the said public street and highway, feloniously, wilfully, and maliciously did tear, spoil, cut, and deface: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, seven years' transportation. 6 Geo. 1. c. 23. s. 11. The words in the act are "tear, spoil, cut, burn, or deface."

**Evidence.* [253]

1. Prove an assault, as directed ante, p. 241, *et seq.* Prove it to have been committed in a public street or highway, as mentioned in the indictment. Prove it to have been done wilfully and maliciously. And prove it to have been done with intent to tear, spoil, cut, or deface the clothes of A. N. Where a man followed two young ladies in the street, using the most insulting and indecent language to them, and after a while struck one of them a blow on the hip with a sharp instrument, which wounded her, and also cut her clothes: the judges held the case not to be within the statute; for the primary object of the defendant was, not to spoil the clothes, but to do an injury to the person of the prosecutrix. R. *v.* Williams, 1 Leach, 529, 1 East, P. C. 424.

2. Prove that the defendant actually tore, spoiled, cut, or defaced the clothes mentioned in the indictment, or some of them, and that such clothes were the property of A. N.

Sect. 4.

FALSE IMPRISONMENT.

Indictment for an Assault, and False Imprisonment.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S. late of the parish of B. in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms at the parish aforesaid, in the county aforesaid, in and upon one J. N., in the peace of God and of our lord the King then and there being, did make an assault; and him the said J. N. then and there did beat, wound, and ill treat; and him the said J. N. then and there unlawfully and injuriously, and against the will of the said J. N., and also against the laws of this realm, and without any legal warrant, authority, or reasonable or justifiable cause whatsoever, did imprison, and detain so imprisoned there for a long space of time, to wit, for the space of ten hours then next ensuing*; and other wrongs to the said J. N. then and there did: to the great damage of the said J. N., and against the peace of our lord the King, his crown and dignity. If any money were extorted from the prosecutor, for setting him at liberty, then add an averment of it, immediately after the above asterisk, as thus: then next ensuing, and until he the said J. N. had paid to

the said J. S. the sum of five pounds and five shillings, of the
[254] monies of the said J. N., for *his enlargement; and other wrongs, &c. as above. Add a count for a common assault, as ante, p. 241.

Misdemeanor at common law, punishable with fine or imprisonment, or both.

Evidence for the prosecution.

All the prosecutor has to prove, is the imprisonment; it is for the defendant to shew that he was justified in what he did, and that the imprisonment was lawful.

And every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 2 Inst. 589. Cro. Car. 210. Com. Dig. Imprisonment G. But where a magistrate's warrant was shewn by the constable who had the execution of it, to the person named in it, and he thereupon, without compulsion, attended the constable to the magistrate, and upon examination was dismissed: this it seems was not an imprisonment. 2 New Rep. 211.

If the prosecutor fail in proving the imprisonment, he may proceed to prove the second count for the assault and battery, as directed ante, p. 241.

Evidence for the defendant.

The defendant must either prove that he did not imprison J. N. at all, or he must justify the imprisonment. The grounds upon which an imprisonment can be justified, may be considered under the following heads.

Arrest under civil process.] An arrest under mesne process issuing out of any of the superior courts, if regular, and regularly executed, may be justified, not only by the officer who made it, but also by the plaintiff and his attorney, whether in fact there be a cause of action or not; for if there be no cause of action, the party's only remedy is against the plaintiff, by action on the case for maliciously holding him to bail. Belk. *v.* Broadbank, 3 T. R. 183. Rowland *v.* Veale, Cowp. 18. In order to justify under mesne process, however, it is essential to shew that it was returned. Cowp. 18. 2 Ro. Abr. 563. pl. 9. 18. Fortesc. 379.

An arrest upon a *ca. sa.* out of a superior court, if regular, and regularly executed, may be justified by the officer who executed it, whether there be a judgment to warrant it or not; 1 Lev. 95. 3 Lev. 20. 1 Salk. 409; But if the plaintiff or his attorney would justify under it, he must shew such a judgment as will warrant it; Per Holt, C. J. Carth. 443. Barker *v.* Braham et al. 3 Wils. 368, 2 W. Bl. 866; and therefore, where a *ca. sa.* was sued out on a judgment against an adminis-
[255] tratrix, *without suggesting a *devastavit*, it was holden that false imprisonment would lie against the plaintiff and his attorney. Id. But it is not necessary that a *ca. sa.* should be returned, in order to justify under it, as is the case under mesne process. Rowland *v.* Veale, Cowp. 18.

As to process out of an inferior court, it must appear that the court had jurisdiction of the cause of action, 10 Co. 76 a. 68 b. and see 3 Lev. 141. 243. T. Jon. 165, and that the process was executed within the jurisdiction, 3 Lev. 243, in order to justify either the officer or the party.

But if the writ or warrant be void upon the face of it, as if there be

more than one term between the teste and return of mesne process, 3 Wils. 341, 2 W. Bl. 845, or if the officer's name be inserted in the warrant after it is sealed, 2 Wils. 47, or if the writ be executed after the day on which it is returnable, 2 Esp. 585, or on a Sunday, 29 C. 2. c. 7. s. 6, it will be no justification to the person arresting under it. So an arrest of A. B., cannot be justified under a writ against C. D., Hardr. 323. Moor, 457. 2 Selw. N. P. 850, even although it may be proved that A. B. was the person actually intended to be arrested, although misnamed in the writ, 8 East, 328, and see 6 T. R. 234, unless indeed it be satisfactorily shewn that he was known as well by one name as the other. 8 East, 328. But neither the officer nor party is subject to an indictment for false imprisonment, for arresting a person privileged from arrest, whether the privilege be permanent, 2 Doug. 671, or temporary. 2 W. Bl. 1190, and see Id. 1195.

Arrest under warrant.] A warrant from a magistrate, having general cognizance of the matter of it, will justify the officer in executing it, whether there be any grounds in fact for granting it or not; Shergold *v.* Holloway, 2 Str. 1002; but on the contrary, if, for instance, the magistrate granted a warrant to take up J. N. to answer in a plea of debt, the constable would not be justified in arresting him. Id. and see Com. Dig. Imprisonment, H. 8, 9. So, a conviction of a magistrate, having competent jurisdiction of the subject matter of it, upon which the party has been arrested, is until reversed or quashed, conclusive evidence in favour even of the magistrate, in a prosecution against him for false imprisonment. 7 T. R. 633 n.

Arrest without warrant.] A justice of peace may apprehend, or cause to be apprehended by a verbal order merely, any person committing a felony or breach of the peace in his presence, 2 Hale, 86.

The sheriff or coroner also may apprehend any felon within the county, without warrant. 4 Bl. Com. 289.

A constable may arrest any one for a breach of the peace in his presence, and keep him in his house or the stocks until he *can [256] bring him before a magistrate. 1 Hale, 587. So, a constable may justify arresting a man upon a reasonable charge of felony, although it afterwards appear that the man is innocent, or even that no felony was in fact committed. Samuel *v.* Payne et al. Doug. 359. But where a felony has been actually committed, a constable may arrest a man upon a reasonable suspicion of his having committed it; 2 Inst. 52. 1 Hale, 90, 91, 92. Ledwith *v.* Catchpole, Cald. 291; and it has been holden, that the question of reasonable suspicion, is matter of law, and should not be left to the jury. Hill *v.* Yates, 2 Moor, 80, and see Mure *v.* Kayne, 4 Taunt. 34.

A watchman or beadle may arrest and detain in custody for examination, any person he finds in the streets at night, whom there is reasonable ground to suspect of felony, although there be no proof of a felony actually committed. Lawrence *v.* Hedger, 3 Taunt. 14, and see 2 Hale, 98. 2 Inst. 52.

A private person (and *à fortiori* a peace officer), if a felony be committed, or a dangerous wound given, in his presence, is not only justified in arresting, but is bound by law to arrest the felon. 2 Hawk. c. 12. s. 1. So, he is justified in restraining persons committing an affray; but he cannot arrest any person concerned in it, after the affray is over, for in that case a warrant is necessary. 2 Inst. 52. So he may arrest any man about to commit a felony or treason, or any act which would manifestly endanger another's life, and detain him until the intent be presumed to have ceased.

2 Hawk. c. 12. s. 19. 2 Ro. Abr. 559, E. Hancock *v.* Baker, 2 B. & P. 260. So, upon a reasonable suspicion, he may arrest another for felony: but he does it at his peril; for if the party be innocent, the person arresting is guilty of a false imprisonment. Stonehouse *v.* Elliot, 6 T. R. 315.

Arrest for a contempt.] If a contempt be committed in the face of a court, (as, by rude and contumelious behaviour; by obstinacy, perverseness or prevarication; by breach of the peace, or any wilful disturbance whatever,) the judge may order the offender to be instantly apprehended and imprisoned, at his (the judge's) discretion, without any further proof or examination. See 2 Hawk. c. 22. 4 Bl. Com. 282, 283. 1 Taunt. 146.

Arrest after an escape.] In civil cases, where a person in custody in execution escapes;—if it be a negligent escape, the jailer or officer may retake him; if voluntary, a retaking would be a false imprisonment: 1 Saund. 35 n. 1 Sid. 330. 1 Show. 174. Atkinson *v.* Jameson, 5 T. R. 25: where a person in custody upon mesne process escapes,—if the escape be negligent, the jailer or officer may retake him at any time; if
[257] voluntary, he may retake him at any time before the return *of the writ, Atkinson *v.* Matteson, 2 T. R. 172, but not after it.

In criminal cases, where a prisoner escapes,—if the escape be negligent merely, the jailer or officer may retake him, at any time, without warrant; Dalt. c. 169; if voluntary, he cannot afterwards be retaken by virtue of the same warrant under which he was at first arrested, 2 Hawk. c. 13. s. 9, but he may be retaken on a fresh warrant, or without warrant in cases where he might have been arrested without warrant originally.

Arrest under other authority.] Where a feme covert appeared before a justice of peace as a material witness in a case of felony, it was holden that he was justified in committing her until the sessions, upon her refusing to appear at the sessions to give evidence, or to find sureties for her appearance. Bennet *v.* Watson, 3 M. & S. 1.

Officers in the army and navy have in many instances authority to imprison soldiers and seamen under their command. But false imprisonment has been holden to lie against a superior officer, where the imprisonment at first was legal, but was afterwards aggravated with many circumstances of cruelty, and continued beyond all necessary bounds. Wall. *v.* Macnamara. 1 T. R. 536, cit. So, where a seaman was confined by his captain for three days, for a supposed breach of duty, and was then liberated by him without being brought to a court martial, it was holden that false imprisonment would lie. Swinton *v.* Molloy, 1 T. R. 537, cit.

An arrest and detention under an impress warrant, may be lawful: but the party executing it, does so at his peril; for if he take a man not liable to be impressed, as, for instance, a person who has never served at sea, he is guilty of a false imprisonment. Flewster *v.* Royle. 1 Camp. 187.

But where a ship is taken *bonâ fide* as prize, the necessary imprisonment of the crew in such a case, is not to be deemed a false imprisonment, although it afterwards turn out that the ship was not liable to capture. Le Caux *v.* Eden, 2 Doug. 594.

SECT. 5.

CHILD STEALING.

Indictment for Stealing a Child.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that A. S. late of the parish of B., in the *county of M., spinster, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, a certain male child under the age of ten years, to wit, of the age of seven years, named H. N., the son of one J. N., then and there being found, then and there feloniously and maliciously, by force and fraud, did lead, take, and carry away, with intent, by concealing and detaining the said child from the said J. N. its parent, to deprive the said J. N. of the possession of the said child: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*2d count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid in the county aforesaid, a certain other male child under the age of ten years, to wit, of the age of seven years, named H. N., the son of the said J. N., then and there being found, then and there feloniously, maliciously, and by fraud did decoy and entice away, with intent, *&c. as in the first count. Add two other counts, the same as the above two, but charging the intent thus:* with intent certain articles of apparel and ornament, and other things of value and use, to wit, [*here enumerate the articles, as in an indictment for larceny*] the goods and chattles of the said J. N., upon and about the person of the said child then and there being, then and there feloniously to steal, take, and carry away: against the form, &c. &c. It is not necessary, perhaps, to enumerate the articles, a mere intent to steal them being charged; or to allege them to be the goods of J. N., the words in the statute being "to whomsoever such article may belong:" but it may probably be more prudent to do so, particularly if there be no difficulty in proving them. If the child were living apart from its parent at the time it was stolen, as, for instance, if it were at school or at nurse, or the like, then instead of describing him as the son of J. N., or J. N. as its parent, immediately after the words, "by concealing and detaining the said child from one J. N." add "(the said J. N. then and there having the lawful care and charge of the said child)."

[258]

Felony, punishable in the same manner as grand larceny. 54 G. 3. c. 101. s. 1.

Evidence.

Prove that the defendant took or enticed the child away; and prove the child to have resided with J. N. at the time, and that J. N. was its parent, or had "the lawful care or charge" of it, as laid in the indictment. Prove also such further circumstances, from which the jury may presume the intent with which the offence was committed, as laid in the first and second, or in the third and fourth counts of the indictment.

*The father of an illegitimate child, taking it out of the possession of its mother, or of any other person who may have charge of it, is not within the act. 54 G. 3. c. 101. s. 2.

[259]

Sect. 6.

RAPE.

Indictment for a Ravishing a Woman.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one A. N., in the peace of God and our lord the King then and there being, violently and feloniously did make an assault, and her the said A. N. then and there violently, and against her will, feloniously did ravish and carnally know: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 18 El. c. 7. s. 1.

Evidence.

That J. S.] If it be proved that the defendant is under the age of 14 years, he must be acquitted, whatever may be the nature of the evidence against him; for a boy, under the age of 14 years, is presumed by law incapable to commit a rape. 1 Hale, 631. A husband also cannot be guilty of a rape upon his wife. Id. 629. But in both cases they may be principals in the second degree, and punished for being present aiding and abetting. Id. 629, 630.

The said A. N. violently and against her will.] It must be proved that the rape was committed on A. N. against her will; and which of course implies violence. If, however, she yielded through fear of death or duress, it is rape. 1 Hawk. c. 41. s. 6. And it is no excuse that she consented at first, if the offence were afterwards committed by force or against her will; nor is it any excuse that she consented after the fact. Id. s. 7. Even that the woman was a common strumpet, or the concubine of the ravisher, is no excuse, 1 Hale, 629, although such circumstances should certainly operate with the jury as to the credibility of the fact, that connexion was had with the woman against her consent.

[260] *The party ravished is indeed a competent witness to prove this and every other part of the case; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, upon the circumstances of fact that concur in that testimony. For instance; if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to have been committed, were where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption, that her testimony is false or feigned. 4 Bl. Com. 213. And the defendant may give evidence of the woman's notoriously bad character for want of chastity or common decency, or that she had before been connected with the prisoner himself; but he cannot give evidence of any other particular facts to impeach her chastity. R. *v.* Hodgson, 1 Ph. Ev.

190. R. *v.* Clarke, 2 Stark. 243. So, what she herself said so recently after the fact, as to preclude the possibility of her being practised on, has been holden to be admissible in evidence as a part of the transaction; but the particulars of her complaint are not evidence of the truth of her statement R. *v.* Brazier, 1 East. P. C. 444. R. *v.* Clarke, 2 Stark. 241.

Did ravish and carnally know.] To constitute the offence of rape, there must be penetration and emission. R. *v.* Hill, 1 East, P. C. 439.

Any the slightest penetration will be sufficient; where a penetration was proved, but not of such a depth as to injure the hymen, still it was holden to be sufficient to constitute the crime of rape. R. *v.* Russen, 1 East, P. C. 438, 439.

Emission is either proved positively, by the evidence of the woman, that she felt it: or it may be presumed from circumstances, as, for instance, that the defendant after having connexion with the prosecutrix, arose from her voluntarily, without being interrupted in the act: R. *v.* Harmwood, 1 East, 440. R. *v.* Sheridan, 1 East, 438; but if he were interrupted in the act, and arose from her on that account, then, in the absence of positive evidence, the presumption is that there was no emission, and the defendant must be acquitted.

Indictment for carnally Knowing and Abusing a Female under Ten Years.

Commencement as in the last precedent.] In and upon one A. *N., [261] an infant under the age of ten years, to wit, of the age of nine years, in the peace of God and our lord the King then and there being, feloniously did make an assault, and her the said A. N. then and there feloniously did unlawfully and carnally know and abuse: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 18 El. c. 7. s. 4.

Evidence.

The evidence is the same as in rape; with this exception, that it is immaterial whether the act was done with or without the consent of the female. The child may be a witness, if she appear sufficiently to understand the nature and moral obligation of an oath. See ante, p. 94. She must be proved to be under ten years of age.

Indictment for an Assault with intent to commit a Rape.

Commencement, as ante, p. 241.] Did make an assault, and her the said A. N. then and there did beat, wound, and ill treat, with intent her the said A. N., violently and against her will, then and there feloniously to ravish and carnally know: and other wrongs to the said A. N. then and there did: to the great damage of the said A. N., and against the peace of our lord the King, his crown and dignity.

Misdemeanor at common law, punishable with fine and imprisonment.

Evidence.

Prove an attempt to commit a rape, the offence being incomplete for want of evidence of emission, or the like. If upon this indictment the prosecutrix were to prove a rape actually committed, the defendant must be acquitted. See R. *v.* Harmwood, 1 East, P. C. 411. 440.

Indictment for an Assault with intent carnally to know a Child under Ten Years.

Commencement, as in the precedent, ante, p. 241.] Did make an assault, and her the said A. N. then and there did beat, wound, and ill treat, with intent her the said A. N. then and there feloniously and unlawfully, carnally to know and abuse; and other wrongs, &c. *as in the last precedent.*

Misdemeanor at common law, punishable with fine and imprisonment.

[262] **Evidence.*

Prove an attempt to have a connexion with A. N. an infant under ten years, the offence being incomplete for want of evidence of emission, or the like. *Vide supra.*

SECT. 7.

SODOMY, &c.

Indictment for Sodomy.

Commencement, as ante, p. 259.] In and upon one J. N. then and there being, feloniously did make an assault, and then and there feloniously, wickedly, diabolically, and against the order of nature, had a venereal affair with the said J. N., and then and there carnally knew him the said J. N., and then and there feloniously, wickedly, diabolically, and against the order of nature, with the said J. N. did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians:) against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 27 H. 8. c. 6. 5 El. c. 17.

Evidence.

The evidence is the same as in rape; see ante, p. 259; with two exceptions: 1*st*, that it is not necessary to prove the offence to have been committed against the consent of the person upon whom it was perpetrated: and 2*dly*, both agent and patient (if consenting) are equally guilty. In R. *v.* Wiseman, Fortesc. 91, where the defendant was indicted for having committed this offence with a woman, a majority of the judges held that this was within the statute, but two or three of them held that it was not; no opinion was publicly given. If it be committed on a boy under fourteen years of age, it is felony in the agent only; 1 Hale, 670. 3 Inst. 59; and the same, it should seem, as to a girl under twelve.

Indictment for Bestiality.

Commencement, as ante, p. 259.] County aforesaid, with a certain cow, then and there being, feloniously, wickedly, diabolically, and against the order of nature, had a venereal affair, and then and there felo-
[263] niously, wickedly, diabolically, and *against the order of nature carnally knew the said cow; and then and there feloniously, wickedly, diabolically, and against the order of nature, with the said cow did commit and perpetrate that detestable and abominable crime of bug-

gery (not to be named amongst Christians:) against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 27 H. 8. c. 6. 5. El. c. 17. The carnal knowledge is proved in the same manner as in rape or sodomy. See ante, p. 259. 262.

Indictment for an Assault, with Intent to Commit Sodomy.

Commencement, as ante, p. 241.] In and upon one J. N., in the peace of God and our lord the King then and there being, did make an assault, and him the said J. N. then and there did beat, wound, and ill treat, with intent that detestable and abominable crime (not to be named among Christians) called buggery, with the said J. N. then and there feloniously, wickedly, diabolically, and against the order of nature to commit and do: to the great displeasure of Almighty God, to the great damage of the said J. N., and against the peace of our lord the King, his crown and dignity.

Misdemeanor at common law, punishable with fine and imprisonment.

Evidence.

Prove an attempt to commit sodomy, the offence being incomplete for want of evidence of emission, or the like. If, however, the complete offence of sodomy be proved, the defendant must be acquitted.

*BOOK II.

PLEADING AND EVIDENCE IN PARTICULAR CASES.

PART II.

OFFENCES OF A PUBLIC NATURE.

CHAPTER I.

Offences against the King, and his government.

SECT. 1. *High Treason.*
2. *Coining.*
3. *Sedition and Blasphemy.*
4. *Administering Unlawful Oaths.*
5. *Inciting to Mutiny.*
6. *Embezzling the King's Stores.*

SECT. 1.

HIGH TREASON.

Indictment for Compassing the King's Death.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, a subject of our said lord the King then and there being, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lord the King, and wholly withdrawing the al-
[265] legiance, *fidelity, and obedience which every true and faithful subject of our said lord the King, should, and of right ought to bear towards our said lord the King, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, and on divers other days as well before as after, with force and arms, at the parish aforesaid, in the county aforesaid, maliciously, and traitorously, together with divers other false traitors to the jurors aforesaid unknown, did compass, imagine, devise, and intend to depose our said lord the King from the royal state, title, power, and government of this realm, and from the style, honour, and kingly name of the imperial crown thereof, and to bring and put our said lord the King to death: and the said treasonable compassing, imagination, device, and intention, then and

there maliciously and traitorously did express, utter, declare, and evince, by divers overt acts and deeds hereinafter mentioned, that is to say: IN ORDER TO FULFIL, PERFECT, AND BRING TO EFFECT his most evil and wicked treason, and treasonable compassing, imagination, device, and intention aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards, to wit, on the said third day of May in the year aforesaid, and on divers other days as well before as after, with force and arms, at the parish aforesaid in the county aforesaid, maliciously and traitorously did conspire, consult, consent, and agree with one A. B., C. D., and divers other false traitors to the jurors aforesaid unknown, to raise, levy, and make insurrection, rebellion, and war within this kingdom, against our said lord the King: AND FURTHER TO FULFIL, PERFECT, AND BRING TO EFFECT his most evil and wicked treason, and treasonable compassing, imagination, device, and intention aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards, to wit, [*&c. &c. so proceeding to state other overt acts, in the same manner; and then conclude the count thus:*] in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, contrary to the duty of the allegiance of him the said J. S., against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

It may be satisfactory, in this place, to enumerate the several acts which have been decided, or which have been deemed by writers upon the subject, to be sufficient overt acts of compassing the death of the King.

Every thing wilfully or deliberately done or attempted, whereby the King's life may be endangered, is an overt act of compassing his death. Fost. 195. Killing the King, is an overt act of compassing his death, and was so laid in the case of the *regicides. Kel. 8. So, [266] going armed for the purpose of killing the King; R. *v.* Somerville et al. 1 And. 104; providing arms, ammunition, poison, or the like, for the purpose of killing the King; 1 Hale, 108. 3 Inst. 12; conspirators meeting and consulting of the means of killing the King, Fost. 195. R. *v.* Vane, Kel. 15. R. *v.* Tong. et al. Kel. 17, and see Kel. 21, or of deposing him, or of usurping the powers of government, R. *v.* Hardy et al. 1 East, P. C. 60, or resolving to do it; R. *v.* Rookwood, 4 St. Tr. 661. R. *v.* Charnock, Id. 562, 2 Salk. 631; acting as counsel against the King, in order to take away his life: R. *v.* Coke, Kel. 12, and see R. *v.* Harrison, 2 St. Tr. 314: all these are sufficient overt acts of compassing the King's death.

So, other species of high treason, which are distinct heads of treason in themselves, may be laid as overt acts of compassing the King's death: thus, levying war *directly* against the King, Fost. 195. 210, 211. 1 Hale, 122, 123. 151. Kel. 21. 3 Inst. 12, (but not a mere constructive levying of war, such as pulling down all inclosures, or the like, 1 Hale, 123. See post); or even a conspiracy to levy war directly against the King, for the purpose of dethroning him, or of obliging him to change his measures, or the like, Fost. 197. 211. 1 Hale, 119. 121. R. *v.* Friend, 4 St. Tr. 599. R. *v.* Darrel, 10 Mod. 321. R. *v.* Layer, 4 St. Tr. 229, 332. R. *v.* Campion et al. Sav. 3. R. *v.* Lord Russel, 3 St. Tr. 705, and see Id. 683. 701. 731. R. *v.* Sidney, 3 St. Tr. 807. R. *v.* Cook. 4 St. Tr. 737—776; (but not a conspiracy to effect a rising for the purpose of throwing down all inclosures, or of any other species of constructive

levying of war, Fost. 213. Per Holt, C. J. Holt. 682. Per Cur. 10 Mod. 322;) adhering to the King's enemies; Fost. 196, 197. R. *v.* Harding, 2 Vent. 315. R. *v.* Lord Preston, 4 St. Tr. 410—455. R. *v.* Stone, 6 T. R 527; inciting foreigners to invade the realm: Fost. 196. 1 Hale, 120. 3 Inst. 14. R. *v.* Story, Dy. 298 R. *v.* Parkyns, 4 St. Tr. 627: all these are sufficient overt acts of compassing the King's death.

Writings which import a compassing of the King's death, are sufficient overt acts of this species of treason, if published: 1 Hale, 118. 3 Inst. 14. Fost. 198. 1 Hawk. c. 17. s. 31: as, for instance, writings inciting persons to kill the King, R. *v.* Twyn, Kel. 22, or the like. *See the several cases collected in Pyne's case*, Cro. Car. 117. So, words of advice or persuasion, are sufficient overt acts of this species of treason, if they advise or persuade to an act which would of itself (if committed) be a sufficient overt act. Fost. 195. 200. R. *v.* Charnock, 4 St. Tr. 562. 2 Salk. 631. So, words may be laid in the indictment, to explain an act; as, for instance, an act seemingly innocent in itself, may be shewn to be an overt act of treason, by its connexion with words spoken by the party at the time. 1 Hale, 115, and see R. *v.* Parkyns, 4 St. Tr. 627.

[267] 657. R. *v.* Crohagan, *Cro. Car. 332. R. *v.* Lee, 7 St. Tr. 43. But loose words, which have no reference to any act or design, or which are not words of persuasion or advice, cannot be deemed overt acts of treason. Fost. 200—205. R. *v.* Theving et al. 3 St. Tr. 79—90.

Where words or writings however are laid as overt acts, it is sufficient to set forth the substance of them; R. *v.* Francia, 6 St. Tr. 58. 73. R. *v.* Lord Preston, 4 St. Tr. 411. R. *v.* Watson, 2 Stark. 137; for in no case is it necessary that the whole detail of the evidence should be set forth; it is sufficient that the charge be reduced to a reasonable certainty, so that the defendant may be apprised of its nature, and be prepared to answer it. Fost. 194.

Any number of overt acts may be laid; Kel. 8; but if any one sufficient overt act be proved, it will maintain the count. 1 Hale, 122. Fost. 194.

Evidence.

The evidence must be applied to the proof of the overt acts, and not to the proof of the principal treason; for the overt act is the charge to which the prisoner must apply his defence. And whether the overt act proved, be a sufficient overt act of the principal treason laid in the indictment, is matter of law, to be determined by the court. It is also expressly enacted that no evidence shall be admitted of any overt act not laid in the indictment: 7 & 8 W. 3. c 3. s. 8: that is to say, no overt act amounting to a distinct independent charge, although it be an overt act of the species of treason charged, shall be admitted in evidence, unless it be expressly laid in the indictment; but if an overt act not laid, amount to direct proof of any other overt act which is laid, it may be given in evidence to prove such overt act. R. *v.* Rookwood, 4 St. Tr. 661. 697. R. *v.* Deacon, Fost. 9. R. *v.* Lowick, 4 St. Tr. 718. 722. 731. R. *v.* Layer, 8 Mod. 82. 89. 6 St. Tr. 229. 282. 284. R. *v.* Wedderbourn, Fost. 22. Ante, p. 68.

Although writings cannot be laid as an overt act, unless published, yet if they tend to prove any overt act laid, they shall be admitted in evidence for that purpose, although never published. R. *v.* Lord Preston, 4 St. Tr. 410. 440. R. *v.* Layer, 6 St. Tr. 272—280. R. *v.* Hensey, 1 Bur. 642. 644. And in Colonel Sidney's case, if the papers found in his

closet; had been plainly referable to the other treasonable practices charged in the indictment, they might indisputably have been read in evidence against him, although not published. Fost. 198. Also, it is no objection that the writings or any other articles, were not found until after the apprehension of the defendant. R. *v.* Watson, 2 Stark. 137.

Where words of incitement have reference to an act, after *giving evidence of the words, you may give evidence of [268] the act, in order fully to explain them. R. *v.* Lord G. Gordon, Doug. 590. 593.

Where a conspiracy is laid as an overt act, the acts of any of the conspirators in furtherance of the common design, may be given in evidence against all. R. *v.* Hardy, 1 East, P. C. 98. R. *v.* Stone, 6 T. R. 527, and see Kel. 19, 20. and ante, p. 68. In such a case, the first thing to be proved is the conspiracy; secondly, evidence must be given to connect the defendant with it; and lastly, if intended to give in evidence against the defendant the acts of any other person, you must shew that such person was also a member of the same conspiracy, and that the act done was in furtherance of the common design. See R. *v.* Sidney, 3 St. Tr. 798, &c. R. *v.* Lord Lovat, 9 St. Tr. 670, &c.

The time at which the overt acts are alleged to have been committed, need not be proved as laid; it is sufficient if they be proved to have been committed at any time within three years before the finding of the indictment. R. *v.* Charnock, 1 Salk. 288. R. *v.* Lord Balmerino, 9 St. Tr. 587—605. R. *v.* Townley, Fost. 7, 8.

As to the place where the overt act is alleged to have been committed: an overt act must be proved to have been committed in the proper county. See R. *v.* Lord Preston, 4 St. Tr. 410—455. But if any one overt act be proved against the defendant in the proper county, acts of treason tending to prove such overt act laid, though done in a foreign county, may be given in evidence; and this was done in nearly all the trials of the rebels in the year 1746. Fost 9. 22.

Where several overt acts are laid, proof of any one of them will maintain the count, provided the overt act so proved is a sufficient overt act of the species of treason charged in the indictment. 1 Hale, 122. Fost. 194.

Form of a Count for levying War.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., being a subject of our said lord the King, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lord the King, and wholly withdrawing the allegiance, fidelity, and obedience, which every true and faithful subject of our said lord the King should and of right ought to bear towards our said lord the King, on the said third day of May, in the third year of the reign aforesaid, with force and arms, at the parish aforesaid in the county aforesaid, together with divers other false traitors to the jurors aforesaid unknown, armed and arrayed in a warlike manner, that is to say, with *guns, muskets, blunderbusses, pistols, swords, bayonets, pikes, [269] and other weapons, being then and there unlawfully, maliciously, and traitorously assembled and gathered together against our said lord the King, most wickedly, maliciously, and traitorously did levy and make war against our said lord the King within this realm, and did then and there maliciously and traitorously attempt and endeavour by force and

arms to subvert and destroy the constitution and government of this realm as by law established, and deprive and depose our said lord the King of and from the style, honour, and kingly name of the imperial crown of this realm: in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, contrary to the duty of the allegiance of him the said J. S., against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

In this count, it is not necessary to set out the particular acts of the defendant; it is sufficient to allege generally that he assembled with a multitude, armed and arrayed in a warlike manner, and levied war. Fost. 220.

Evidence.

In order to maintain this count, it is necessary to prove that which in law amounts to a levying of war, directly or constructively, against the King in his realm; and to prove that the defendant was either actually engaged in it, or present aiding and abetting.

In order to constitute a levying of war, the number of persons assembled is not material; three or four will constitute it, as fully as a thousand. 3 Inst. 9. Nor is it necessary that they should be *more guerrino arraiati*, armed with military weapons, with colours flying, &c., although it is usually so stated in the indictment. Fost. 208. and see R. *v.* Dammaree & Purchase, Fost. 208. Nor is actual fighting necessary to constitute a levying of war; Fost. 218. 1 Hale, 144; for, as the court held in Vaughan's case, (5 Str. Tr. 17—39. 2 Salk. 634,) enlisting and marching are sufficient, without coming to battle. After an action has taken place, it is termed *bellum percussum*; before it, *bellum levatum*.

War levied against the King, is of two kinds, direct and constructive: direct, when the war is levied directly against the King or his forces, with intent to do some injury to his person, to imprison him, or the like; 1 Hale, 131, 132; such, for instance, as open rebellion, for the purpose of deposing, or imprisoning the King, or of getting him into the power of the rebels, or of forcing him to put away his ministers, or the like; 1 Hale, 152. Fost. 210. and see R. *v.* The Earls of Essex and
[270] Southampton, Moor, 620. 1 St. Tr. 197; holding or defending *any of the King's castles, forts, or ships, against the King or his forces, or delivering them up to rebels through treachery: 3 Inst. 10. Fost. 219. 1 Hale, 325, 326: constructive where it is levied for the purpose of effecting innovations of a public and general nature by an armed force; Fost. 211; as, for the purpose of attempting by force to obtain the repeal of a statute, to alter the religion established by law, or to obtain the redress of any other public grievance, real or pretended; 1 Hawk. c. 17. s. 25. 1 Hale, 153. Fost. 211. 3 Inst. 9, 10. R. *v.* Lord G. Gordon, Doug. 590; or an insurrection for the purpose of throwing down all inclosures, pulling down all bawdy houses, opening all prisons, &c., expelling all strangers, enhancing the price of wages generally, or the like. Fost. 211, 1 Hale, 132. R. *v.* Bradshaw et al., Poph. 122. R. *v.* Messenger et al., Kel. 70—79. Therefore, where a mob assemble for the purpose of destroying all the protestant dissenting meeting houses, and actually pulled down two, it was holden to be treason. R. *v.* Dammaree, 8 St. Tr. 218. R. *v.* Purchase, Id. 267. But an insurrection for the purpose of throwing down the inclosures of a particular manor, park, common, &c., or upon a mere quarrel between private persons, Fost. 210. 1 Hale, 131. 133. 149, or to deliver one or more particular persons out

of prison (they not being imprisoned for treason,) 1 Hale, 134, or holding a house by force against the sheriff and *posse comitatus*, 1 Hale, 146, is not treason.

Also, in order to maintain this count, proof must be given of a war actually levied, and not merely of a conspiracy to levy it. 1 Hale, 131—148. 1 Hawk. c. 17. s. 27.

It may be necessary here to mention, that in the case of war levied directly against the King, all persons assembled and marching with the rebels, are guilty of treason, whether they are aware of the purpose of the assembly, or aid and assist in committing acts of violence, or not; R. *v.* The Earls of Essex and Southampton, Moor, 621; unless compelled to join and continue with them *pro timore mortis*. Fost. 216, 217. 3 Inst. 10. 1 Hale, 49. 51. 139, and see R. *v.* M'Growther, Fost. 13. But in the case of a constructive levying of war, those only of the rabble who actually aid and assist in doing those acts of violence which form the constructive treason, are traitors; the rest are merely rioters. See R. *v.* Messenger, et al., Kel. 70—79, 1 Sid. 358. 2 St. Tr. 585—594.

Form of a count for Adhering to the King's Enemies.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the said third day of May in the year last aforesaid, and long before and continually from thence hitherto, an open and public war was and yet is prosecuted and carried on between our said lord the King, and Louis King of *France, to wit, at the parish aforesaid in [271] the county aforesaid; and that the said J. S., a subject of our said lord the King then and there being, well knowing the premises, but not regarding the duty of his allegiance, nor having the fear of God in his heart, and being moved and seduced by the instigation of the devil as a false traitor against our said lord the King, and wholly withdrawing the allegiance, fidelity, and obedience which every true and faithful subject of our said lord the King should and of right ought to bear towards our said lord the King, and contriving, and with all his strength intending, to aid and assist the said King of France, so being an enemy of our said lord the King as aforesaid, in the prosecution of the said war against our said lord the King, heretofore and during the said war, to wit, on the said third day of May, in the year last aforesaid, and on divers other days as well before as after, with force and arms, at the parish aforesaid in the county aforesaid, maliciously and traitorously was adhering to, and aiding and comforting the said King of France, so being then and there an enemy of our said lord the King as aforesaid: AND THAT in the prosecution, performance, and execution of his treason and traitorous adhering aforesaid, he the said J. S., as such false traitor as aforesaid, during the said war, to wit, on the said third day of May in the year last aforesaid, and on divers [*&c. here set out the overt acts, introducing each overt act thus:* and in further prosecution, performance, and execution of his treason and traitorous adhering aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards and during the said war, to wit, on, &c. &c.; *and conclude the count thus:*] in contempt of our said lord the King and his laws, to the evil example of all others in like case offending, contrary to the duty of the allegiance of him the said J. S., against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. The special acts of adherence must be set forth in the indictment as overt acts; but it is not necessary in this or in any other case of treason, that in laying the overt acts, a detail of the evidence intended to be given at the trial should be stated; it is sufficient if

the charge be reduced to a reasonable certainty, so that the defendant may be apprised of the nature of the offence with which he is charged. Fost. 220. 194. We shall now state what has been decided or deemed to be overt acts of this species of treason.

The words in the statute are: "or be adherent to the enemies of our lord the King in his realm, giving to them aid or comfort in the realm or elsewhere." Hence every assistance given by the King's subjects to his enemies, unless given from a well grounded apprehension of immediate death in case of a refusal, is high treason within this branch of the statute. Therefore, if British subjects join the King's enemies in acts of hostility against this country, Fost. 216. 1 Hawk. c. 17. s. [272] 28, *or even against the King's allies, Fost. 220. Per cur in R. *v.* Vaughan, 2 Salk. 635, or join the enemy's forces, although no acts of hostility be committed by them either against the King or his allies, Fost. 218. R. *v.* Vaughan, 2 Salk. 634, 5 St. Tr. 17, or raise troops for the enemy, R. *v.* Harding, 2 Vent. 316, or deliver up the King's castles, forts, or ships of war to the King's enemies through treachery, or in combination with them, Fost. 219. 3 Inst. 10. 1 Hale, 168, or even detain the King's castles, &c. from him, if it be done in confederacy with the enemy, Fost. 219. 1 Hale, 326, or send money, arms, intelligence, or the like, to the King's enemies, Fost. 217, although such money, intelligence, &c. be intercepted and never reach them: R. *v.* Gregg, 10 St. Tr. Ap. 77, Fost. 198, 217, 218. R. *v.* Hensey, 1 Bur. 642. R. *v.* Lord Preston, 4 St. Tr. 409—455: all these are cases of adhering to the King's enemies, and the parties are guilty of high treason. And where letters, &c. have been thus intercepted, it is much better to charge them to have been sent from the place where the venue was laid, *to be* delivered in parts beyond the seas to the enemy, according to the fact, than to state them to have been sent *in partes transmarinas* to be delivered to the enemy. Fost. 218. In R. *v.* Stone, it was objected that the intelligence transmitted by the defendant to the enemy, was calculated to dissuade them from invading this country, and was sent with that intent; but Lord Kenyon, C. J. said that whether the intelligence were calculated to dissuade or invite the enemy, was immaterial; if it were such as was likely to prove useful to them, in enabling them to annoy us, defend themselves, or shape their attacks, sending such intelligence with a view of its reaching the enemy was undoubtedly high treason. 6 T. R. 527. If a British subject incite foreigners to invade this country, it is treason, whether the foreigners be enemies or not: if enemies, it is treason within this branch of the statute: if not enemies, still it is an overt act of compassing the King's death. Fost. 196, 197. 1 Hale, 167. But if a British subject be in a foreign country when war breaks out between that country and this, and continue to reside there, or if during a truce he go to the foreign country, and return before the truce expires, this is no treason, unless he actually conspire with the enemy, or aid him in forwarding his measures for hostility. 1 Hale, 165, 166.

As to the King's enemies, within the meaning of this statute:—the subjects of all states against which his Majesty may have proclaimed or declared war, are his enemies; so are the subjects of states in actual hostility with us, whether war have been solemnly proclaimed or not. Fost. 219. 1 Hale, 162. But merely issuing letters of marque, does not create a state of hostility between two states, although nearly equal to a state of war in its consequences. 1 Hale, 162. Nor is inciting [273] the subjects of a state in amity with us, to invade this *country, treason within this branch of the statute, although it certainly

would be an overt act of compassing the King's death. 1 Hale, 167. But if the subjects of a state in amity with us, were to invade this country in a hostile manner, or otherwise commit hostilities against us, they would be enemies within the meaning of this statute, and adhering to them would be treason. Fost. 219. 1 Hale, 164. 3 Inst. 11. 4 Inst. 152. R. *v.* Vaughan, 2 Salk. 634. 5 St. Tr. 17—39. British subjects, however, can never be deemed the King's enemies, within the meaning of this act; and therefore, to give relief or assistance to a rebel, would not be treason within this branch of the statute. 3 Inst. 11. 1 Hale, 159. 1 Hawk. c. 17. s. 28.

It must appear upon the face of the indictment, that the persons adhered to were enemies.

Evidence.

This count is proved in the same manner as the count for compassing the King's death, (see ante, p. 267, &c.) namely, by proving one or more of the overt acts laid. The fact of the persons adhered to being enemies, may be proved by the production of the Gazette containing the proclamation, if war were formally proclaimed; or public notoriety is sufficient evidence of it. 19 E. 4. 6. 4 Fost. 219. 1 Hale, 164. And whether they were enemies or not, is a matter of fact to be determined by the jury. Id.

An actual adherence must be proved; a mere conspiracy or intention to adhere, is not treason within this branch of the statute, although probably such a conspiracy might be laid as an overt act of compassing the King's death. But if you can prove such a conspiracy, and connect the defendant with it by evidence, and can prove an act done by any one of the conspirators in furtherance of the common design: you may give it in evidence against the defendant, if it tend to prove any of the overt acts laid in the indictment; for the act of one, in such a case, is the act of all. See R. *v.* Stone, 6 T. R. 527, and see ante, p. 268.

Form of a Count on Stat. 36 G. 3. c. 7. s. 1, *for Conspiring to Incite Foreigners to Invade the Realm.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., being a subject of our said lord the King, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lord the King, and wholly withdrawing the allegiance, fidelity, and obedience which every true and faithful subject of our said lord the King should and of right ought to bear
*towards our said lord the King, on the third day of May in the [274]
year last aforesaid, and on divers other days and times as well
before as after, with force and arms, at the parish aforesaid in the county aforesaid, maliciously and traitorously, together with divers other false traitors to the jurors aforesaid unknown, did compass, imagine, invent, devise, and intend to move and stir divers foreigners and strangers, to wit, Louis the King of France, and divers other foreigners and strangers to the jurors aforesaid unknown, with force and arms, to invade this realm; and the said compassing, imagination, invention, device, and intention, did then and there express, utter, and declare, by divers overt acts and deeds hereinafter mentioned, that is to say: IN ORDER TO FULFIL, PERFECT, AND BRING TO EFFECT his said most evil and wicked treason,

and treasonable compassing, imagination, invention, device, and intention aforesaid [&c. &c. setting out the overt acts, and concluding the count, as in the form, ante, p. 264.]

The evidence necessary to support this count, may readily be made out from the directions given ante, p. 267; the same rules applying equally to this count, as to the count for compassing the King's death.

Form of other Counts upon Stat. 36 G. 3. c. 7. s. 1.

Commencement, ut supra.] Did compass, imagine, invent, devise, and intend the death and destruction of our said sovereign lord the King; and the said compassing, &c. &c. *ut supra.*

Commencement, ut supra.] Did compass, imagine, invent, devise, and intend certain bodily harm tending to the death and destruction of our said sovereign lord the King; and the said compassing, &c. &c. *ut supra.*

Commencement, ut supra.] Did compass, imagine, invent, devise, and intend to maim and wound our said sovereign lord the King; and the said compassing, &c. &c. *ut supra.*

Commencement, ut supra.] Did compass, imagine, invent, devise, and intend the imprisonment and restraint of the person of our said sovereign lord the King; and the said compassing, &c. &c. *ut supra.*

Commencement, ut supra.] Did compass, imagine, invent, devise, and intend to deprive and depose our said sovereign lord the King of and from the style, honour, and kingly name of the imperial crown of this realm; and the said compassing, &c. &c. *ut supra.*

[275] **Commencement, ut supra.*] Did compass, imagine, invent, devise, and intend to levy war against our said sovereign lord the King, within this realm, in order by force and constraint to compel his said Majesty to change his measures and counsels; which said compassing, &c. &c. *ut supra.*

Commencement, ut supra.] Did compass, imagine, invent, devise, and intend to levy war against our said sovereign lord the King, within this realm, in order to put force and constraint upon, and to intimidate and overawe both houses of parliament; which said compassing, &c. &c. *ut supra.*

SECT. 2.

COINING.

Indictment for Counterfeiting the King's Money.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, and contriving and intending our said lord the King and his people, craftily, falsely, deceitfully, feloniously, and traitorously to deceive and defraud, on the third day of May in the third year of the reign of our said sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, ten pieces of false, feigned, and counterfeit money and coin of pewter, lead, tin, and other mixed metals, to the likeness and similitude of the good, legal, and current money and silver coin of our said lord the King

of this realm, called shillings, then and there falsely, deceitfully, feloniously, and traitorously did forge, counterfeit, and coin: against the duty of his allegiance, against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

High treason. 25 Ed. 3. st. 5. c. 2. The words in the statute are, "if a man counterfeit the great or privy seal of the King, or his money." This includes the gold and silver coin only, and not the copper coin. 1 Hale, 211. But it includes not only the gold and silver coin made in England, but that also made by the King's authority in any part of the realm, 1 Hawk. c. 17. s. 57. 1 Hale, 188, or the dominions thereunto belonging; Semb. 1 Hale, 211. Staundf. 3. c.; it does not however extend to foreign coin, even although made current here, 1 Hale, 210, which is specially for by stat. 1 Mary, sess. 2. c. 6. s. 2.

**Evidence.* [276]

It is rarely the case that the counterfeiting can be proved directly, by positive evidence; it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the defendant's house, together with some pieces of the counterfeit money in a finished, some in an unfinished state,—or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited, or caused to be counterfeited, or was present aiding and assisting in counterfeiting, the coin in question. Or if several conspire to counterfeit the King's coin, and one of them actually do so in pursuance of the conspiracy, it is treason in all, and they may be indicted for counterfeiting the King's coin generally. 1 Hale, 214.

A variance between the indictment and evidence, in the number of the pieces of coin alleged to be counterfeited, is immaterial; but a variance as to the denomination of such coin, as guineas, sovereigns, shillings, &c., would be fatal.

And the counterfeit coin produced in evidence, must appear to have that degree of resemblance to the real coin, that it would be likely to be received as the coin for which it was intended to pass, by persons using the caution customary in taking money. In R. *v.* Varley, the defendant had counterfeited the resemblance of a half guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition in which it then was: and the judges held that the offence was incomplete. 2 W. Bl. 682. So, in R. *v.* Harris et al., where the defendants were taken in the very act of coining shillings, but the shillings coined by them were then in an imperfect state, it being requisite that they should undergo another process, namely, immersion in a solution of *aqua-fortis*, before they could pass as shillings: the judges held that the offence was incomplete. 1 Leach, 161. A trifling variance from the real coin, in the inscription, effigies, or arms, however, will not take the case out of the statute; 1 Hale, 215; and although the counterfeit coin be made of a different metal from the real coin, as lead, tin, copper, &c., gilt or silvered over, yet it is within the meaning of the statute, and the making of such counterfeit coin is treason. Id. Also, where the counterfeit coin was made to resemble the smooth worn shillings then in circulation, without any impression whatever upon them, the case was holden to be within the statute. R. *v.* Wilson, Leach, 320. R. *v.* Welch, Id. 403.

If it become a question whether the coin, which the counterfeit money was intended to imitate, be the King's coin, it is not necessary to pro-

duce the proclamation to prove its legitimation; it is a mere
[277] question of fact, to be left to the jury, *upon evidence of usage, reputation, &c. 1 Hale, 196. 212, 213.

Also, it is not necessary to prove that the counterfeit coin was uttered or attempted to be uttered. 1 Hale, 215. 229. 3 Inst. 16.

Indictment for Counterfeiting Copper Money.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, one piece of copper money of this realm, commonly called a halfpenny, then and there feloniously did make, coin, and counterfeit: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*2d count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid in the county aforesaid, one piece of false, feigned, and counterfeit copper money, to the likeness and similitude of the good, legal, and current copper money of this realm, called a halfpenny, then and there feloniously did make, forge, coin, and counterfeit: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, within clergy. 11 G. 3. c. 40. s. 1. The first of the above counts pursues the words of the statute: the second is, in strictness, more correct: for it is not strictly correct to call the piece of money coined, a piece of the copper money of the realm.

Evidence.

Prove the counterfeiting, as directed under the last precedent. The above statute, 11 G. 3. c. 40. s. 1, extends only to halfpence and farthings; but it has since been extended, by stat. 37 G. 3. c. 126, to all such copper money as shall be coined and issued by order of his Majesty, *and* as shall by his royal proclamation be ordered to be deemed and taken as current money of this realm. So that, upon an indictment for counterfeiting any other piece of copper money but a halfpenny or farthing, it seems necessary that the proclamation should be produced in evidence.

Indictment for Clipping, Rounding, and Filing the Current Coin.

Commencement, as ante, p. 275.] In the county aforesaid, ten
[278] pieces of the proper monies and coins of this realm called *sovereigns, then and there falsely, deceitfully, and traitorously, and for wicked lucre and gain's sake, did clip, round, and file: against the duty of his allegiance, against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity

High treason. 5 El. c. 11. s. 2. The evidence consists simply in proving, by direct or circumstantial evidence, a clipping, rounding, or filing of one or more sovereigns by the defendant. The indictment must allege the offence to have been committed "for wicked lucre and gain's sake.

Indictment for Uttering Counterfeit Money.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J S., late of the parish of B., in the county of M., laborer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of the good, legal, and current money and silver coin of our said lord the King of this realm, called a shilling, as and for a piece of such good, legal, and current money and silver coin, called a shilling, then and there falsely and deceitfully did utter and tender to one J. N.; he the said J. S., at the time he so uttered and tendered the said piece of false and counterfeit money as aforesaid, then and there well knowing the same to be false and counterfeited: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Six month's imprisonment, and security for good behaviour for six months more. 15 G. 2. c. 28. s. 2. *This statute does not include copper money.* R. *v.* Curwan, 1 East, P. C. 182.

Evidence.

1. Prove the uttering or tendering in payment the shilling in question, and prove it to be a base and counterfeit shilling. Where a good shilling was given to a Jew boy for fruit, and he put it into his mouth, under pretence of trying if it were good, and then taking a bad shilling out of his mouth instead of it, returned it to the party, saying that it was not good: this (which is called ringing the changes) was holden to be an uttering, within the meaning of the act. R. *v.* Franks, 2 Leach, 736.

2. Prove that the defendant knew it to be a counterfeit shilling, at the time he uttered it. This of course, must be done by circumstantial evidence. See ante, p. 78. If, for instance, it be proved that he uttered, either on the same day or at other times, base money of the same description to the *same or to a different person, or had [279] other pieces of base money about him when he uttered the counterfeit money in question, this will be evidence from which the jury may presume a guilty knowledge. Per Thompson B., in R. *v.* Whiley et al., 2 Leach, 983.

Indictment for a Subsequent Offence.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that heretofore, to wit, [at the general quarter sessions of the peace, holden at ———, *so continuing the record of the conviction for the first offence to the end of the judgment inclusive, stating it however in the past, and not in the present tense; see ante, p. 52; then proceed thus:*] as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void. And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, [at the general quarter sessions of the peace, holden at ———, *setting out, in the same manner, the record of the conviction for the second offence.*] And the jurors first aforesaid upon their oath aforesaid, do further present, that the said J. S. afterwards, after being so convicted as aforesaid, to wit, on the third day of May in the year last aforesaid, at the parish aforesaid, in the county aforesaid,

one piece of false and counterfeit money, made and counterfeited, &c. &c. *as in the last precedent, excepting that you must charge it to have been done "feloniously."*

Third offence, felony, death. 15 G. 2. c. 28. s. 2. *If he have been but once before convicted, charge it accordingly; and the punishment for the second offence is but two year's imprisonment, and sureties for good behaviour for two years more.* 15 G. 2. c. 28. s. 2.

Evidence.

Prove the uttering with which the defendant is charged in the indictment, as directed ante, p. 278; and if a third offence, it must be proved to have been committed within six months before the commencment of the present prosecution. 15 G. 2. c. 28. s. 5.

2. Prove the former convictions thus: if they were in the same county, &c., get the clerk of assize or clerk of the peace to make up the records, and produce them at the trial; if in another county, &c., the clerk of assize and clerk of the peace respectively, are required by the statute to give the prosecutor, or any other on behalf of his Majesty, upon application, a short transcript containing the tenor and effect of such conviction, which, being produced in court, shall be sufficient
[280] *evidence of the same; and for which transcript, 2*s. 6*d.* and no more shall be paid. 15 G. 2. c. 28. s. 9.

Indictment for Uttering Twice within Ten Days.

Proceed as in the precedent, ante, p. 278, nearly to the end, to the words "well knowing the same to be false and counterfeit," *inclusive; and then proceed thus:* and that the said J. S., afterwards, on the same day, that is to say, on the said third day of May, in the year last aforesaid, [*or*, afterwards and within the space of ten days next after he the said J. S. so uttered and tendered the said last mentioned piece of false and counterfeit money as aforesaid, to wit, on the sixth day of May, in the year last aforesaid,] at the parish aforesaid, in the county aforesaid, one other piece of false and counterfeit money, made and counterfeited to the likeness and similitude, [&c. &c. as in the precedent, ante, p. 278,] did utter and tender to the said J. N., [*or* 'to one G. H.,'] so continuing the indictment, as in the precedent, ante, p. 278, to the end. See R. *v.* Tandy, 2 Leach, 833.

To be deemed a common utterer of false money, and to suffer one year's imprisonment, and to find sureties for good behaviour for two years more. 15 G. 2. c. 28. s. 3. *And if, after being convicted of this double offence, he shall again be convicted of uttering or tendering in payment any false or counterfeit money, it will be felony, death.* Id. *An indictment for this felony, may readily be framed from the last precedent.* See R. *v.* Smith, 2 B. & P. 127.

Evidence.

Prove the two offences, as directed ante, p. 278; and prove them both to have been committed on the same day, or within the space of ten days, according as it is alleged in the indictment.

Indictment for Uttering Counterfeit Money, having other Counterfeit Money at the same time in his Possession.

The same as the precedent, ante, p. 278, to the words "well knowing the same to be false and counterfeit," *inclusive; then proceed thus:* and that the said J. S., at the time he so uttered and tendered the said piece of false and counterfeit money as aforesaid, had about him the said J. S., in his custody and possession, a certain other piece of false and counterfeit money, made and counterfeited to the likeness and similitude of the good, legal, and current money and silver coin of our said lord the King of this realm, called a ———; he the said J. S., then and there well knowing the said last *mentioned piece of false and counterfeit [281] money to be false and counterfeit: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

To be deemed a common utterer of false money, and to suffer one year's imprisonment, and to find sureties for good behaviour for two years more. 15 G. 2. c. 28. s. 3. *And if, after being convicted of this offence, he shall again be convicted of uttering or tendering in payment any false or counterfeit money, it will be felony, death. Id. An indictment for this felony may readily be framed from the precedent,* ante, p. 279.

Evidence.

Prove the offence of uttering, as directed ante, p. 278; and prove that the defendant at the same time had about him one or more pieces of the counterfeit money specified in the indictment.

Indictment for putting off counterfeit money at a lower rate than by its denomination it imports.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, ten pieces of false and counterfeit milled money, made and counterfeited to the likeness and similitude of the good, legal, and current milled money and silver coin of our said lord the King, of this realm, called a shilling, (the said several pieces of counterfeit money not being then cut in pieces,) feloniously and unlawfully did pay and put off to one J. N., at and for a lower rate and value than the said pieces of false and counterfeit milled money, by their denomination, did then and there import and were respectively coined and counterfeited for, that is to say, at the rate of four pence for each and every of the said pieces: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, within clergy. 8 & 9 W. 3. c. 26. s. 6. This statute extends, not only to counterfeit milled money, but to all milled money whatsoever, unlawfully diminished and not cut into pieces; and not only to paying and putting off such money, but also to the receiving of it.

Evidence.

Ten pieces of counterfeit milled money, &c.] Milled money is *that, the metal of which has been flatted and made of a proper [282] thickness, by passing through a mill or press, before the pieces

of coin are cut out of it; R. *v.* Bunning, 2 Leach, 624; which is the case, I believe, with all the silver and gold money at present coined. And to maintain the above indictment, it is not the counterfeit money that must be proved to be milled, but the genuine coin, which the counterfeit money has been intended to imitate. Id. A variance between the indictment and evidence, in the number of pieces, is not material.

Not being cut in pieces.] From the position of these words in the statute, it might be doubted if they applied to any but the "milled money unlawfully diminished" therein mentioned; but as it seems to have been decided in one case (R. *v.* Palmer, 1 Leach, 102,) that these words apply, not only to the diminished money, but also to the counterfeit milled money mentioned in the statute, it is as well to insert them in the indictment, particularly as there can be no difficulty in proving the fact.

Did pay and put off.] It must be proved that the defendant paid *or* put off one or more of the pieces of counterfeit money in question. And it must have been parted with, and not merely uttered or tendered. Where A. brought a parcel of counterfeit shillings to B., and agreed to sell them at the rate of 29 shillings for a guinea, and they were accordingly laid in a heap on the table; but whilst B. was reckoning them, and before A. was paid for them, the officers entered and seized both: this was holden not to be within the act. R. *v.* Woolridge, 1 Leach, 307.

At and for a lower rate, &c.] This must be proved: but it should seem that it is not necessary to prove that each of the counterfeit shillings was put off at the exact rate of four pence; if proved to have been put off at the rate of any sum under twelve pence, it would be sufficient.

Also, it must be proved that the prosecution was commenced within three months after the offence was committed. 8 & 9 W. 3. c. 26. s. 9.

Indictment for the like, as to copper money.

The same as the last, except that instead of "*milled money*," you insert "*copper money*;" for "*not being cut in pieces*," insert "*not being melted down or cut in pieces*;" and for the words "*pay and put off*," insert "*sell, pay, and put off*;" together with such little alterations, as the difference of the denomination of the coins may render necessary.

Felony, within clergy. 11 G. 3. c. 40. s. 2. As to the evi-
[283] dence *to support this indictment, see the evidence under the last precedent.

Indictment for having Coining Tools in his Possession.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, not being a person employed in and for his Majesty's mint or mints in the tower of London or elsewhere, and for the use and service of the said mints only, and not being a person lawfully authorized by the lords commissioners of the treasury of our said lord the King, or by the lord high treasurer of England, and not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, knowingly, feloniously, and traitorously had in the custody and possession of him the said J. S., (without lawful authority or sufficient excuse for that purpose) one die made of iron and steel, in and upon which then and there was, and was made and impressed, the figure, stamp, resemblance, and similitude of

one of the sides and flats, to wit, the head side, of the lawful silver coin current within this kingdom, called a shilling, and which said die would then and there make and impress the figure, stamp, resemblance, and similitude of one of the sides and flats, to wit, the head side, of the said lawful silver coin current within this kingdom, called a shilling: against the duty of his allegiance, against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

High treason. 8 & 9 W. 3. c. 26. s. 1. The statute describes many instruments of coinage; and the instrument which is the subject of the indictment, must be therein described in such a manner as to bring it within some of the descriptions in the statute. See the statute; and see R. *v.* Leonard, 2 W. Bl. 807. 822. R. *v.* Bell, Fost. 430.

Evidence.

Prove that the defendant had in his custody or possession the die in question; and the die, when produced in evidence, must appear to be such as is capable of making an impression, so nearly resembling the current shillings, as would be likely to impose upon persons using the ordinary caution in taking money. A puncheon, making an impression resembling the head side of the shillings coined in King William's reign, but without the letters round it, was nevertheless holden to be *within the statute: for the shillings of that coinage were then [284] in such a state, that the letters round the head were not discernible; and the puncheon was capable of making an impression resembling them in that state. R. *v.* Ridgelay, 1 Leach, 189. But an instrument which can make part of the impression only, and which cannot possibly of itself make either side of the counterfeit coin resemble the lawful current coin of the country, as, for instance, an instrument making an impression resembling the sceptre upon the half guinea, is not within the act. R. *v.* Sutton, 2 Str. 1073. Hardw. 354.

Indictment for Concealing such Tools.

Commencement, as in the last precedent.] In the county aforesaid, in the dwelling house of J. N. there situate, did hide and conceal one die made of iron and steel, in and upon which then and there was, and was made and impressed, &c. &c. *as in the last precedent.*

High treason. 8 & 9 W. 3. c. 26. s. 1. Prove a concealment of the die in question in the house of J. N., by the defendant. See the evidence under the last precedent.

Other Offences relating to the Coin.

Knowingly bringing false money into the realm, counterfeit to the money of England, is high treason. 25 Ed. 3. st. 5. c. 2. Forging foreign coin current in this realm, is high treason. 1 M. sess. 2. c. 6. s. 2. Forging foreign coin not permitted to be current here, is a misprision of treason. 14 El. c. 3. Importing counterfeit foreign coin, current here, is high treason. 1 & 2 Ph. & M. c. 11. s. 2. Uttering or putting off counterfeit foreign coin, not permitted to be current here,—the first offence is punishable with six month's imprisonment, and finding sureties for good behaviour for six months more; the second, two year's imprisonment, and sureties for good behaviour for two years more; and the

third, felony, death. 37 G. 3. c. 126. s. 3. Colouring, gilding, &c. any coin to make it resemble the gold or silver coin of the kingdom, is high treason. 8 & 9 W. 3. c. 26. s. 4. See R. *v.* Lavey et al. 1 Leach, 182. R. *v.* Case, 1 East, P. C. 165. R. *v.* Harris et al. 1 Leach, 161. Colouring silver coin to make it resemble gold coin, or colouring brass coin to make it resemble the silver coin, is high treason. 15 G. 2. c. 28. s. 1. Marking the edges of the current coin or of coin counterfeit to it, is high treason. 8 & 9 W. 3. c. 26. s. 3. Impairing, diminishing, falsifying, scaling, or lightening the coin of the realm, or foreign coin current here, is high treason. 18 El. c. 1. s. 1. Melting down the current coin of the realm, punishable with six month's imprisonment. 6 & 7
[285] W. 3. c. 17. s. 8. 13 & 14 C. 2. *c. 31. Receiving or paying the current gold coin for more than the lawful value thereof, six month's imprisonment and sureties for good behaviour for twelve months more, for the first offence; one year's imprisonment and sureties for good behaviour for one year more, for the second offence; and for every subsequent offence, two year's imprisonment. 52 G. 3. c. 50. Conveying out of his Majesty's mint any tools or instruments of coinage, is high treason. 8 & 9 W. 3. c. 26. s. 2.

An indictment for any of the offences here enumerated, may readily be framed from some of the foregoing precedents.

Sect. 3.

SEDITION AND BLASPHEMY, &c.

Indictment for a Seditious Libel.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. H., late of the parish of B., in the county of M., clerk, being a wicked, malicious, seditious, and ill disposed person, and being greatly disaffected to our said lord the King, and to his administration of the government of this kingdom and the dominions thereunto belonging, and wickedly, maliciously, and seditiously contriving, devising and intending to stir up and excite discontents and seditions amongst his Majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his said Majesty's subjects from his said Majesty, [and cause it to be believed that divers of his Majesty's innocent and deserving subjects had been inhumanly murdered by his said Majesty's troops in the province, colony, or plantation of the Massachusetts Bay, in New England in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his Majesty's subjects in the said province, colony, or plantation, to resist and oppose his Majesty's government,] on the eighth day of June, in the fifteenth year of the reign of our sovereign lord George the Third, with force and arms, at the parish aforesaid, in the county aforesaid, wickedly, maliciously and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel of and concerning [his said Majesty's government and the employment of his troops], according to the tenor and effect following: that is to say: ["King's Arms tavern, Cornhill, June 7, 1775. At a
[286] special *meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed

that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of one hundred pounds, to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the King's (meaning his said Majesty's) troops at Lexington and Concord, in the province of Massachusetts, (meaning the said province, colony, or plantation of the Massachusetts Bay in New England in America), on the nineteenth of last April: which sum being immediately collected, it was thereupon resolved that Mr. H. (meaning himself the said J. H.) do pay to-morrow into the hands of Mess. B. & C. on account of Dr. F., the said sum of one hundred pounds; and that Dr. F. be requested to apply the same to the above mentioned purpose. J. H." (meaning himself the said J. H)] : in contempt of our said lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. There were other counts, charging that the defendant "printed and published, and caused and procured to be printed and published" in several newspapers, the same libel; and other counts charging the printing and publishing of part of the same libel, setting it out, to the words " the nineteenth of last April," inclusive; and lastly a count, charging the defendant with having written and published another but similar libel. This was the case of R. *v.* Horne, Cowp. 672; it was in fact an information *ex officio;* but I have given it the shape of an indictment, to make it conformable with the other precedents in the volume. The defendant himself moved in arrest of judgment, and made several objections, the principal of which was, that it was not averred that the employment of the troops was by the King's authority: but the court after much consideration declared themselves clearly of opinion that the information was sufficient. See also R. *v.* Burdett, 4 Barn. & Ald. 314.

The punishment for a seditious libel is fine and imprisonment. But if the libel tend to bring into hatred or contempt the person of his Majesty, or the government and constitution of the united kingdom as by law established, or either house of parliament; or to excite his Majesty's subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means: then, by stat. 60 G. 3. c. 8. s. 4, for a second offence, the offender may either be punished as for a misdemeanor at common law, or be adjudged to be banished from his Majesty's dominions, at the discretion of the court before whom he was tried. The indictment for a second offence may be framed in a similar manner to the *precedent, ante, p. 279; and the [287] statute requires the clerk of assize or clerk of the peace to furnish the prosecutor with a certificate containing the substance of the first conviction, which certificate shall be sufficient proof of such previous conviction. 60 G. 3. c. 8. s. 7.

We shall now proceed to make a few observations on what shall be deemed sedition, and on the form of the indictment for that offence.

First, as to what shall be deemed sedition. Political writings and words may be classed under three heads: those which are overt acts of treason; those which are seditious; and those which are allowable and justifiable. We have seen what political writings and words amount to overt acts of high treason. Ante, p. 266, 267. On the other hand, a man may lawfully discuss and criticise the measures adopted by the King and his ministers for the government of the country, provided he do it fairly,

temperately, with decency and respect, and without imputing to them any corrupt or improper motive. See R. *v.* Lambert & Perry, 2 Camp. 398. All political writings or words between these extremes, therefore, may be deemed seditious. As, for instance, if a man curse the King, wish him ill, give out scandalous stories concerning him, or do any thing that may lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people; or if he deny the King's right to the throne, in common and unadvised discourse (for if it be by advisedly speaking, it amounts to *præmunire*:) all these are sedition. 4 Bl. Com. 123. In R. *v.* Tuchin (5 St. Tr. 532, Holt. 424,) *Lord Holt* said, that "if men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished." And *Lord Ellenborough*, in R. *v.* Cobbet (Holt. on Libel, 114. Stark. on Libel, 529,) said that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient resorted to be ridicule or obloquy, the writer, publisher, &c. are punishable. And whether the defendant really intended, by his publication, to alienate the affections of the people from the government, or not, is not material; if the publication be calculated to have that effect, it is a seditious libel. R. *v.* Burdett, 4 Barn. & Ald. 95.

Secondly, as to the form of the indictment. As to the mere formal part, it is sufficient to refer to the precedent, ante, p. 285. The indictment must charge a publication; composing or writing a libel merely, does not seem to be an offence, unless the libel be afterwards published. See R. *v.* Burdett, 4 Barn. & Ald. 95. But if a man write a libel in the county of L., with intent to publish it, and afterwards publish it [288] in the county of *M., he may, it seems, be indicted for a misdemeanor in either county. Id., Per. 3 JJ, Bayley, J. dub.

2. Such part of the publication as is libellous, or as the prosecutor chooses to set out, must be set out correctly; Wright *v.* Clements, 3 Barn. and Ald. 503; any material variance will be fatal. See ante, p. 64, Tabbart *v.* Tipper, 1 Camp. 352. If parts of the publication be selected, they must be set forth thus "in a certain part of which said ——— there were and are contained certain false, wicked, malicious, scandalous, seditious, and libellous matters, of and concerning," &c. "according to the tenor and effect following, that is to say:" "And in a certain other part," &c. &c. See 1 Camp. 350. Per Lord Ellenborough. If the libel be in a foreign language, it must be set out in such language, verbatim, together with a correct translation. Zenobio *v.* Axtel, 6 T. R. 162.

3. And besides setting out the libellous passages of the publication, the indictment must also contain such averments and inuendoes as may be necessary to render it intelligible, and its application to the King or his government, &c. evident. When the statement of an extrinsic fact is necessary, in order to render the libel intelligible, or to shew its libellous quality, such extrinsic fact must be averred in the introductory part of the indictment; but where it is necessary merely to explain a word, by reference to something which has preceded it, this is done by an inuendo. And an inuendo can explain only in cases where something already appears upon the record to ground the explanation; it cannot, of itself, change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. See 2 Salk. 513. Cowp. 684. Thus, for in-

stance, in an action on the case against a man for saying of another "*he has burnt my barn*," the plaintiff cannot by way of inuendo say "*meaning his barn full of corn*;" Barham's case, 4 Co. 20 a.; because this is not an explanation derived from any thing which preceded it on the record, but from the statement of an extrinsic fact which had not previously been stated. But if in the introductory part of the declaration it had been averred that the defendant had a barn full of corn, and that in a discourse about that barn he had spoken the above words of the plaintiff, an inuendo of its being the barn full of corn would have been good; for by coupling the inuendo with the introductory averment, it would have made it complete. So, in an action for the words "*He is a thief*," you cannot explain the defendant's meaning in the use of the word "*He*," by an inuendo "*meaning the said plaintiff*," or the like, unless something appear previously upon the record to ground that explanation: but if you had previously charged the words to have been spoken of and concerning the plaintiff, then such an inuendo would be correct; for when it is alleged that the defendant said of the plaintiff "*He is a thief*," this is an evident *ground for the explanation given by the inuendo [289] that the plaintiff was referred to by the word "*He*." See 1 Ro. Abr. 83, pl. 7. 85, pl. 7. 2 Ro. Rep. 244. Cro. Jac. 126. 39. 1 Sid. 52. 2 Str. 934. 1 Saund. 242 n. 3. In R. *v.* Tuchin, (5 St. Tr. 532. 590.) one part of the libel was thus: "The mismanagements of the *navy*, have been a greater tax upon the merchants than the duties raised by parliament:" in order to explain what was meant by the navy, the introductory part of the information charged the libel to have been written "of and concerning the royal navy of this kingdom; and the government of the said navy;" and when in stating the libel it came to the word "navy," it explained it by an inuendo thus: "meaning the royal navy of this kingdom; which being coupled with the averment in the introductory part of it, made the sense and the charge complete. In R. *v.* Mathews (9 St. Tr. 682,) the words of the libel were these: "From the solemnity of the chevalier's birth, and if hereditary right be any recommendation, he has that to plead in his favour:" it was there objected, What chevalier? who is he? what recommendation? and to what? But in the introducing part of the information, the libel was charged to have been written "of and concerning the pretender, and of and concerning his right to the crown of Great Britain;" and it was holden that the inuendoes in the body of the libel, explaining the words "chevalier," &c. to mean the pretender and his hereditary right to the crown of Great Britain, when connected with the averment in the introductory part, of its being written "of and concerning the pretender and his right to the crown of Great Britain," were a sufficient explanation to make good the charge. But where the words or libel are in the second person, and the slander is spoken or the libel is directed to the party slandered or libelled, and it is so alleged in the indictment,—as where a declaration charges that the defendant, in a discourse with the plaintiff, said to him, "*You are a thief*,"—it is unnecessary to aver that they were spoken or written of and concerning the plaintiff; nor is there any need of an inuendo, for it is plain enough without it that "*you*" means the plaintiff. Skutt *v.* Hawkins, 2 Ro. Rep. 243, 244. and see 1 Ro. Abr. 85, pl. 8.

See two precedents of indictments for seditious libels, 4 Went. 199. 201.

Evidence on the part of the prosecution.

On the eighth day of June, &c.] The day on which the libel is alleged to have been written and published, is not material, and need not be proved as laid; but a variance between the indictment and evidence, in any dates alleged as mentioned in the libel, would be fatal.

At the parish aforesaid, in the county aforesaid.] The offence [290] of *course must be proved to have been committed in the county in which the venue is laid. If a letter containing the libel, reach the party to whom it is directed, in the proper county, see R. *v.* Johnson, 7 East, 65, even though addressed to him at a place out of the county, R. *v.* Watson, 1 Camp. 215, or even if a sealed letter, containing the libel, be put into the post office in the proper county, R. *v.* Burdett, 4 Barn. & Ald. 95. Per 3 JJ., Bayley, J. dub., it is a sufficient publication of the libel in that county; and in the last case, the three judges held that if a man write and compose a libel in L., with intent to publish it, and afterwards publish it in M., he may be indicted for a misdemeanor in either county. But in R. *v.* Watson (1 Camp. 215,) Lord Ellenborough held that the post mark of a particular place within the county, upon a letter containing the libel, was no evidence of a publication in that county; for the post mark might be forged.

Wickedly, maliciously, and seditiously.] The malice, &c. may be inferred from the libel itself, without any extrinsic evidence of it. R. *v.* Creevy, 1 M. & S. 273. 282. R. *v.* Lord Abingdon, 1 Esp. 226. So, evidence of the defendant's having published other copies of the same libel; Plunkett *v.* Cobbett, 5 Esp. 136; or other libels, R. *v.* Pearce, Peake, 74, provided they expressly refer to the subject of the libel set out in the indictment, Finnerty *v.* Tipper, 2 Camp. 72, is receivable, in order to prove the malicious or seditious intent.

Did write and publish, &c.] Upon a count charging the defendant with having composed, printed, and published a libel, proof that he composed and published it, R. *v.* Williams, 2 Camp. 646, or even that he only published it, R. *v.* Hunt et al. 2 Camp. 583, will be sufficient to maintain it. And proof that he composed it in the county of L., and published it in the county of M., will maintain a count laying the offence in the county of L. R. *v.* Burdett, 4 Barn. & Ald. 95, Per 3 JJ., Bayley J. dub. But a publication must be proved. Sed vide R. *v.* Burdett, 4 Barn. & Ald. 95.

The publication may be, by selling the libel, distributing it gratis, reading it to others, (if he knew the tendency of it before,) or by sending it and having it delivered to another person, or even to the party libelled by it. See Bac. Abr. Libel, B. 2. 1 Hawk. c. 73. s. 11. So, evidence of the defendant's procuring another person to publish the libel, is sufficient to maintain a count charging the defendant with having published it; and therefore, evidence of the libel's being purchased in a bookseller's shop, or at a newspaper office, or the office of a news-vender, or a servant there, in the course of business, will maintain a count charging the master with having published it, 4 Bac. Abr. Libel, B. 2. R. *v.* Al- [291] mon, 5 Bur. 2686, even *although it be proved that the master was not privy to it. R. *v.* Walter, 3 Esp. 21.

Where the libel is contained in a newspaper, and the defendant is indicted for having printed and published it,—in order to prove the defendant to be printer, publisher, or proprietor of the newspaper, get a certified copy of the usual affidavit from the stamp office, (which mentions the names and places of abode of the printer, publisher, and proprietors of the paper, the name of the paper, and the place where it is

printed;) and if the newspaper containing the libel be intituled in the same manner as that mentioned in the affidavit, and the names of the printer and publisher, and the place of printing, be the same as is mentioned in the affidavit, these will be sufficient evidence (conclusive evidence against the person or persons who signed the affidavit, and *primâ facie* evidence against others therein mentioned unless the contrary be satisfactorily proved) of a publication by the persons therein described as printer, publisher, &c. without proving that the newspaper in question was purchased at any place belonging to, or occupied by them, or their servants. 38 G. 3. c. 78. s. 11, 9. This certified copy, upon being proved to have been signed by the person who made it, is evidence not only of the contents of the affidavit, but also of its having been duly sworn by the persons appearing by this copy to have sworn the same. s. 14. Also, by the same statute, the printer or publisher of every newspaper is obliged to deliver at the stamp office, one of the papers so published, signed by him, with his name and place of abode; and the commissioners, upon any person applying, shall either produce the same in evidence, or give it to such person for that purpose, upon receiving reasonable security for its being returned. s. 17. See 10 East, 94. 3 Camp. 99, 100.

A certain false and seditious libel.] The libel itself must be produced in evidence; and if there be any variance in substance, between the writing produced and that set out in the indictment, the defendant must be acquitted. See ante, p. 288. If the libel be in a foreign language, and be set out in that language together with a translation, see ante, p. 288, the translation must be proved to be correct. R. *v.* Peltier, 2 Sel. N. P. 1048.

Meaning his said Majesty.] In strictness all the inuendoes must be proved by some persons acquainted with the matters of the libel, and who can swear that they understand such and such words to mean so and so, or to have reference to such and such persons, things, or facts, as described by the inuendo. In many cases, however, the truth of the inuendo appears so evident from the context of the libel itself, that further proof is *deemed unnecessary, and it is left to the [292] jury upon a consideration of the libel alone.

Evidence for the defendant.

The defendant may prove that he did not write or publish the libel at all; or he may contend that the publication is not libellous; or that he was justified in publishing it,

1. He may prove that he was not concerned in the writing or publishing of the libel in question; and, in the case of a newspaper, he may prove that he is neither printer, publisher, nor proprietor of it, nor otherwise interested or concerned in it, provided he have not signed the affidavit deposited at the stamp office. See ante, p. 291. He may also prove that he was a mere innocent agent in the publication; as, for instance, that he carried and delivered the letter containing the libel, without knowing its contents, or delivered one paper by mistake for another, 4 T. R. 127, 128, or the like. But it is not competent to him to prove that a paper, similar to that, for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it. R. *v.* Holt. 5 T. R. 436.

2. He may prove that the writing in question is not libellous; and for that purpose a defendant has been allowed to give in evidence other pas-

sages in the same newspaper or publication, plainly referring to the subject of the libel in question, or fairly connected with it, though disjoined from it by other matter, and in a different type, in order to prove that his intention was not such as was imputed to him by the prosecution, or that the passage in question would not fairly bear the construction attempted to be given to it. R. *v.* Lambert & Perry, 2 Camp. 400.

3. He may show that he was justified in publishing the matter alleged to be libellous. As, for instance, that it formed part of a speech delivered by him as a member of parliament; see 4 H. 8. c. 8. 1 W. & M. st. 2. c. 2; but this privilege extends only to his speaking in the house; for if he afterward publish his speech, he is amenable for it in the same manner as any other person. R. *v.* Creevey, 1 M. & S. 273. R. *v.* Lora Abingdon, 1 Esp. 226.

So, he may prove that the matter alleged to be libellous, was contained in a petition to parliament, and published to its members only, or contained in articles of the peace, or in some other regular proceeding in a court of justice. 1 Hawk. c. 73. s. 8.

So, he may prove that it is a fair report of proceedings in a court of justice. This, however, must not be considered a justification or excuse in all cases. For instance, in the course of a trial, it may be-
[293] come necessary for the purposes of justice *to hear or read matter of a scandalous, blasphemous, or indecent nature; yet it is not lawful, under the pretence of publishing that trial, to re-utter or circulate such matter. R. *v.* Carlile, 3 Barn. and Ald. 167. and see 1 M. & S. 281, Per Bayley, J. And the same as to the reports of proceedings (particularly *ex parte* proceedings) before magistrates. See R. *v.* Fisher, 2 Camp. 563.

But in no case will the defendant be allowed to prove the truth of the libel, in justification or excuse of his having published it, R. *v.* Burdett, 4 Barn. & Ald. 95, or even in extenuation of punishment. R. *v.* Burdett, Id. 314.

Indictment for Seditious Words.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., being a wicked, malicious, seditious, and ill disposed person, and wickedly, maliciously, and seditiously contriving and intending the peace of our said lord the King, and this kingdom of England, to disquiet and disturb, and the liege subjects of our said lord the King to incite and move to the hatred and dislike of the person of our said lord the King, and to scandalize and vilify the colonels and other officers of the guards of our said lord the King, on the third day of May, in the third year of the reign of our said sovereign lord George the Fourth, with force and arms, at the parish aforesaid in the county aforesaid, in the presence and hearing of divers liege subjects of our said lord the King, wickedly, maliciously, and seditiously did publish, utter, pronounce, and declare with a loud voice, of and concerning our said lord the King, and of and concerning the colonels and other officers of the guards of our said lord the King, these English words following, that is to say: "The colonels and the rest of the officers, (meaning the colonels and officers of the guards of our said lord the King) are a company of rogues and villains; for their business is to uphold their master, (meaning our said lord the King) who (meaning our said lord the King) is a villain and a rogue, and never kept his word in any thing he said:" to the great scandal of our said lord the King, and

of the colonels and other officers of the guards of our said lord the King, in contempt of our said lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *If there be any doubt of being able to prove this precise form of words, you may vary the statement in different counts.*

Fine and imprisonment. As to what amounts to sedition, see ante, p. 287.

**Evidence.* [294]

Prove that the defendant spoke the words set out in the indictment, or at least so much of them as may amount to an indictable offence ; See Cro. Jac. 407. 2 East, 434, Per Lawrence, J. 2 W. Bl. 790 ; any variance in substance will be fatal ; even where the words were set out in the indictment in the third person, "*He is*," &c., and proved to have been spoken in the second person, "*You are*," &c., the variance was holden fatal. R. *v.* Berry, 4 T. R. 217. Prove the inuendoes as in the last precedent. And see the evidence under the last precedent, generally.

Indictment for a Blasphemous Libel.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B. in the county of M., bookseller, being a wicked and evil disposed person, and disregarding the laws and religion of the realm, and wickedly and profanely devising and intending to bring the Holy Scriptures and the Christian religion into disbelief and contempt among the people of this kingdom, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully and wickedly did compose, print, and publish, and cause and procure to be composed, printed and published, a certain scandalous, impious, blasphemous, and profane libel, of and concerning the Holy Scriptures and the Christian religion, in one part of which said libel there were and are contained, amongst other things, certain scandalous, impious, blasphemous, and profane matters and things, of and concerning the Holy Scriptures and the Christian religion, according to the tenor and effect following, that is to say : [here set out the libellous passage ; and if there be another such passage in another part of the libel introduce it thus : in another part thereof, there were and are contained, amongst other things, certain other scandalous, impious, blasphemous, and profane matters and things, of and concerning the said Holy Scriptures and the Christian religion, according to the tenor and effect following ; that is to say : &c. &c., and conclude the count thus :] to the high displeasure of the Almighty God, to the great scandal and reproach of the Christian religion, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. See the observations upon the form of an indictment for libel, ante, p. 287, 288.

Fine and imprisonment. And for a second offence the court may, at their discretion, either fine and imprison, or adjudge the *de- [295] fendant to be banished his Majesty's dominions for such a number of years as they shall think fit. 60 G. 3. c. 8. S. 4. see 9 & 10 W. 3. c. 32. s. 1. and see R. *v.* Carlile, 3 Barn. & Ald. 161.

The evidence is the same as that mentioned ante, p. 289, under the first precedent in this section. The disputes of learned men upon particular controverted points of religion, are not punishable as blasphemy. Per Cur. in R. *v.* Woolstan, 2 Str. 834.

Indictment for Selling an Obscene Print.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., bookseller, being a scandalous and evil disposed person, and devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said lord the King, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, and the clergy of this kingdom to bring into great contempt, hatred, scandal, infamy, and disgrace, on the third day of May in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, in a certain open and public shop of him the said J. S. there situate, unlawfully, wickedly, maliciously, and scandalously did sell and utter to one J. N., a certain lewd, wicked, scandalous, and obscene print or paper, intituled "The parson receiving tithes in kind," representing a man in the habit of a clergyman, in an obscene, impudent, and indecent posture with a woman; and which said lewd, wicked, scandalous, and obscene print or paper, is contained in a certain printed pamphlet then and there uttered and sold by him the said J. S. to the said J. N., intituled "The Covent Garden Magazine, or amorous repository, calculated solely for the entertainment of the polite world, for April, 1773:" to the manifest corruption of the morals, as well of youth as of other liege subjects of our said lord the King, to the great scandal, infamy, and disgrace of the clergy of this kingdom, in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine and imprisonment. See R. *v.* Curl, 2 Str. 788. R. *v.* Wilkes, 4 Bur. 2527. 2574.

Evidence.

Give the print in evidence, and prove that J. N. purchased it of the defendant, or his servant, at his shop.

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[296] *Sect. 4.

ADMINISTERING UNLAWFUL OATHS.

Indictment for Administering an Unlawful Oath.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, did feloniously and unlawfully administer and cause to be administered unto one J. N. a certain oath and engagement purporting, and then and there intended, to bind the said J. N. not to inform or give evidence against any associate, confederate, or other person of and belonging to a certain unlawful association and confederacy; and which said oath and engagement was then and there taken by the said J. N.: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. If the offence have been com-

mitted on the high seas, or out of the realm, the venue may be laid in any county in England. 37 G. 3. c. 123. s. 6.

Felony, transportation for seven years. 37 G. 3. c. 123. s. 1.

It is not necessary to set out the words of the oath; stating the purport, or some material part of it, is all that is required. 37 G. 3. c. 123. s. 4. The oath described by the statute, must purport or be intended to bind the party taking it, to one or other of the following things: viz. 1. To engage in some mutinous or seditious purpose; 2. To disturb the public peace; 3. To be of some association, society, or confederacy formed for any such purpose; 4. To obey the orders or commands of a committee or body of men not lawfully constituted, or of a leader or commander or other person not having authority by law for that purpose; 5. Not to inform or give evidence against any associate, confederate, or other person; 6. Not to reveal or discover any unlawful combination or confederacy; 7. Not to reveal or discover any illegal act done, or to be done; 8. Not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement. 37 G. 3. c. 123. s. 1. If the purport of the oath be doubtful, you should set it out in different ways in several counts, taking care to bring it within some of the descriptions above mentioned. See R. *v.* Moors & al. 6 East, 419 n.

**Evidence.* [297]

Prove that J. S. administered to J. N. an oath or engagement (it is no matter in what form, 37 G. 3. c. 123. s. 5.) of the purport stated in some one count in the indictment. If read from a paper, at the time it was administered, still it is not necessary to produce such paper, or give the defendant notice to produce it; but parol evidence of its purport, without such notice, will be sufficient. R. *v.* Moors & al., 6 East, 421. So, parol evidence of any declarations made by the defendant, at the time he administered the oath, will be received in proof of the nature of the oath, if that do not sufficiently appear from the words of the oath itself. Id. And where it appeared that an oath was unlawfully administered by an associated body of men, purporting to bind the party not to reveal such unlawful combination or conspiracy, or any illegal act done by them, the judges seemed to have no doubt of its being a felony within this act, although it appeared that the object of the association was a conspiracy to raise wages and make regulations in a particular trade, and not to stir up mutiny or sedition. R. *v.* Marks, 3 East, 157.

Indictment for Taking such an Oath.

Commencement, as ante, p. 296.] In the county aforesaid, did feloniously and unlawfully take a certain oath and engagement, purporting [&c. as in the last precedent;] he the said J. S., not being then and there compelled to take the said oath and engagement: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, transportation for seven years. 37 G. 3. c. 123. s. 1. See ante, p. 296.

As to the evidence, *vide supra.* It is not necessary to prove that any person administered the oath. 37 G. 3. c. 123. s. 5. Nor is it necessary for the prosecutor to prove that the defendant was not compelled

to take the oath; compulsion is matter of excuse, and must come in evidence from the other side. And in order to make it a legal excuse, the defendant must prove that he disclosed the whole affair upon oath to a magistrate (or, if a soldier or seaman, to his commanding officer) within four days after, unless prevented by actual force or sickness, and then within ten days after such force or sickness shall have ceased. Id. s. 2.

Indictment for Administering an Oath to Commit Treason or Felony.

[298] *Commencement, as ante, p.* 296.] A certain oath and *engagement, purporting and then and there intended to bind the said J. N. to commit high treason [*or* to commit murder, that is to say, feloniously and of his malice aforethought, to kill and murder one A. B., *or* to commit a certain felony, punishable by law with death, that is to say, feloniously to set fire to and burn a certain dwelling house of one A. B :] and which said oath and engagement was then and there taken by the said J. N. : against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 52 G. 3. c. 104. s. 1. Taking such an oath, felony, transportation for life, or for such term as the court shall adjudge. Id. As to the evidence, see the evidence under the precedent, ante, p 297. If the offence be committed on the high sea, or out of the realm, the venue may be laid in any county. 52 G. 3. c. 104. s. 7.

SECT. 5.

INCITING TO MUTINY.

Indictment for endeavouring to Seduce a Soldier from his Allegiance.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, being a wicked and evil disposed person, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, maliciously, and advisedly, did endeavour to seduce one J. N., (he the said J. N. then and there being a person serving in his Majesty's forces by land) from his duty and allegiance to his said Majesty; he the said J. S., at the time he so endeavoured to seduce the said J. N. from his duty and allegiance as aforesaid, well knowing that the said J. N. was then and there a person serving in his said Majesty's forces by land: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *The venue may be laid in any county.* 37 G. 3. c. 70. s. 2.

Felony, death. 37 G. 3. c. 70. The offence described in the statute is an endeavour to seduce any person serving in his Majesty's forces by sea or land, from his duty or allegiance to his Majesty: or to incite or stir him up, to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever. It is not necessary to allege the means by which he endeavoured to seduce him. R. *v.* Fuller, 1 B. & P. 180.

**Evidence.*

Although, in the indictment, it is not necessary to state the means by which the defendant endeavoured to seduce J. N. from his duty and allegiance, they must be detailed in evidence. It must be proved, also, that J. N. was at the time serving in his Majesty's land forces; and that J. S. was aware of that fact.

Sect. 6.

EMBEZZLING THE KING'S STORES.

Indictment for Embezzling the King's Stores.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of C., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, having the charge and custody of certain armour, munition, shot, and powder, of and belonging to his said Majesty, to the value of twenty shillings and upwards, to wit, two muskets of the value of two pounds, two hundred pounds weight of leaden bullets of the value of twenty shillings, and two hundred pounds weight of gun powder of the value of ten pounds, then and there feloniously and unlawfully, for lucre and gain, wittingly, advisedly, and of purpose to hinder and impeach his said Majesty's service, did embezzle, purloin, and convey away the said armour, munition, shot, and powder, so in his charge and custody as aforesaid: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony. 31 El. c. 4. s. 1; and clergy taken away by stat. 22 C. 2. c. 5, with a proviso however that the judge, in his discretion, may reprieve the defendant, and order him to be transported for seven years. The stat. 31 El. c. 4. s. 1, extends to "armour, ordnance, munition, shot, powder, and habiliments of war," and to "victuals provided for the victualling of soldiers, gunners, mariners, and pioneers." And the stat. 22 C. 2. c. 5, extends it to "sails, cordage, and any other of his Majesty's naval stores." These statutes, however, are seldom enforced, the parties being in general indictable as for larceny.

**Evidence.* [300]

Prove the embezzlement of the articles mentioned in the indictment, or some of them, to the amount of twenty shillings; and prove that the defendant had the charge or custody of them at the time he embezzled them.

Indictment for having Naval Stores in his Possession.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, (not being then and there, or at any time before, a contractor with, or authorized by contracting with, his Majesty's principal officers or commissioners of the navy, ordnance, or victualling of-

fice, for his said Majesty's use, to make any stores of war, or naval stores whatsoever, with the marks usually used to and marked upon his Majesty's said warlike and naval or ordnance stores, and not being employed by any such contractor or contractors for that purpose as aforesaid,) at the parish aforesaid, in the county aforesaid, then and there unlawfully had in the custody and possession of him the said J. S. [a certain quantity of cordage, containing in length seventy yards, and in thickness three inches and upwards, of the value of twenty pounds; which said cordage then and there was wrought with a white thread laid the contrary way, (being the mark with which cordage of that thickness, being warlike and naval stores of our said lord the King, then and before that time usually were and yet are marked)]: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *Add a second count, charging that on, &c. at, &c.* "a certain other quantity of cordage," *&c. as above*, "was found in the custody and possession of the said J. S., he the said J. S. not being then and there, or at any time before, a contractor," *&c. as above*: "against the form," *&c. Add a third count, the same as the first, but substituting the words*, "did conceal," *for the words* "had in the custody and possession of him the said J. S."

200*l. fine, together with the costs of the prosecution*, one moiety to the King and the other to the informer, (that is, the person by means of whose information the stores were seized, 1 Esp. 95. 145,) *and imprisonment until the fine, &c. be paid;* 9 & 10 W. 3. c. 41. s. 2; *and also, whipping or imprisonment, or both, at the discretion of the judge before whom the defendant shall be convicted.* 39 & 40 G. 3. c. 89. s. 2. The judge, however, may mitigate the above penalty. Id. *For a*

[301] *second *offence the defendant shall be transported for fourteen years. Id.* s. 5.

There are several kinds of stores described in the above statutes, 9 & 10 W. 3. c. 41. s. 1. 2. 39 & 40 G. 3. c. 89. s. 2, and also in 9 G. 1. c. 8. s. 3, 54 G. 3. c. 60, and 55 G. 3. c. 127; and care must be taken to bring the stores mentioned in the indictment within some one of these descriptions.

By stat. 39 & 40 G. 3. c. 89. s. 1, if the stores found be "in a raw or unconverted state, or be new or not more than one third worn," the defendant shall be deemed a receiver of stolen goods, and may be transported for 14 years; or, (by s. 7.) the judge may sentence him to be whipt, fined, and imprisoned; a moiety of which fine (if imposed) shall go to the King, and the other moiety to the informer. An indictment on this statute may be the same as the form above mentioned, excepting that immediately after the description of the stores, you add "which said ——— were then and there in a raw and unconverted state," or "were then and there new," or "were then and there not more than one third worn."

Evidence for the prosecution.

All that is necessary, on the part of the prosecution, is, to prove that stores, such as those described in the indictment, were found in the defendant's possession. It is not necessary to give evidence to prove the negative averment, that the defendant is not a contractor, &c.; if he be, that is matter of defence, and he must prove it.

If there be any dispute as to who is to be deemed the informer, the judge or justices, before whom the defendant shall be convicted, shall examine and finally determine the matter. 9 G. 1. c. 8. s. 5.

Evidence for the defendant.

If the defendant be a contractor, or a person employed by a contractor, for the purpose of manufacturing, &c. the stores mentioned in the indictment, he must prove this, and it will be a good excuse for his having them in his possession. See 9 & 10 W. 3. c. 41. s. 1. 39 & 40 G. 3. c. 89. s. 3. So, he may justify his possession of them, by producing the regular certificate for the goods, under the hands of three or more of the principal officers or commissioners of the navy, ordnance, or victualing office, stating the numbers, quantities, and weights of such goods, and the reason of their coming into the defendant's hands. 9 & 10 W. 3. c. 41. s. 2. 4. 8. 39 & 40 G. 3. c. 89. s. 25, 26. So, where a woman was indicted *for having naval stores, namely canvass, in her possession, [302] and she proved that it was in common use in her family during her husband's life time, and came to her upon his death, and was constantly used by her as table linen afterwards; this was holden to be a sufficient excuse, and the defendant was acquitted. Fost. 439. So, if the defendant prove that he bought the stores in question from a person who was in the habit of purchasing at the navy sales, and who he was therefore led to presume had the regular certificate, it will be a sufficient excuse. R. *v.* Banks, 1 Esp. 145.

*CHAPTER II.

Offences against Public Justice.

SECT. 1. *Escape.*
2. *Breach of Prison.*
3. *Rescue.*
4. *Returning from Transportation.*
5. *Perjury.*
6. *Bribery.*
7. *Extortion.*
8. *Misconduct of Officers of Justice.*
9. *Not obeying the Orders of a Magistrate.*
10. *Compounding Felony.*
11. *Libels Reflecting on the Administration of Justice.*

SECT. 1.

ESCAPE.

Indictment against a Constable for a Negligent Escape.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish of B., in the county of M., J. S., then being one of the constables of the said parish, brought one J. N. before A. C. esquire, then and yet being one of the justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county; and the said J. N. then and there was charged before the said A. C. by one Catherine Hope, spinster, upon the oath of the said Catherine, that he the said J. N. had then lately before violently, and
[304] against her will, feloniously *ravished and carnally known her the said Catherine; and the said J. N. was then and there examined before the said A. C., the justice aforesaid, touching the said offence so to him charged as aforesaid: upon which the said A. C. the justice aforesaid, did then and there make a certain warrant under his hand and seal, in due form of law, bearing date the said third day of May in the year aforesaid, directed to the keeper of Newgate or his deputy, commanding him the said keeper or his deputy, that he should receive into his custody the said J. N., brought before him and charged upon the oath of the said Catherine Hope, with the premises above specified; and the said justice by the said warrant did command the said keeper of Newgate or his deputy, to safely keep him the said J. N. there until he

by due course of law should be discharged: which said warrant afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, was delivered to the said J. S., then being one of the constables of the same parish as aforesaid, and then and there having the said J. N. in his custody for the cause aforesaid; and the said J. S. was then and there commanded by the said A. C., the justice aforesaid, to convey the said J. N., without delay, to the said jail of Newgate, and to deliver him the said J. N. to the keeper of the said jail, or his deputy, together with the warrant aforesaid.* And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish aforesaid, in the county aforesaid, baker, afterwards, to wit, on the day and year last aforesaid, then being one of the constables of the said parish as aforesaid, and then having the said J. N. in his custody for the cause aforesaid, at the parish aforesaid, in the county aforesaid, the said J. N. out of the custody of him the said J. S., unlawfully and negligently did permit to escape, and go at large whithersoever he would, whereby the said J. N. did then and there escape, and go at large whithersoever he would: to the great hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine. 2 Hawk. c. 19. s. 31. Where a private person is guilty of a negligent escape, the punishment is fine or imprisonment, or both. Id. c. 20. s. 6. The imprisonment must be for some criminal matter, otherwise the escape is not punishable criminally.

Evidence.

Prove that J. N. was charged with a rape, as alleged in the indictment. Prove the warrant of commitment in substance as set out in the indictment, either by producing the warrant itself, or, after proving the service of a notice upon the *defendant to produce it, give [305] parol or other secondary evidence of its contents. Prove a delivery of the warrant to the defendant. Prove that he had J. N. in actual custody under the warrant. See 2 Hawk. c. 19. s. 1, 4. And lastly, prove the escape. It is not necessary to prove negligence in the defendant; the law implies it: see 1 Hale, 600: but if the escape were not in fact negligent, if the defendant by force rescued himself, or were rescued by others, and the defendant made fresh suit after him, but without effect; all this must be shewn upon the part of the defendant. Also, it is immaterial whether J. N. were guilty of the rape or not, provided the warrant were such as would justify J. S. in detaining him. See ante, p. 255.

Indictment for Escaping out of the Custody of a Constable.

You may state the charge before the magistrate, the warrant of commitment, and the defendant's being in the custody of J. S., as in the last precedent, to the *; and then proceed thus:] and the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N., late of the parish aforesaid, in the county aforesaid, labourer, so being in the custody of the said J. S., under and by virtue of the warrant aforesaid, afterwards, and whilst he continued in such custody, and before he was delivered by the said J. S. to the said keeper of Newgate, or his deputy, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, out of the custody of the said J. S. unlawfully did escape, and go at large

whithersoever he would: to the great hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine and imprisonment. See 2 Hawk. c. 17. s. 5. See the evidence under the last precedent.

Indictment against a Jailer for a Voluntary Escape.

Berkshire, to wit: The jurors for our lord the King upon their oath present, that heretofore, to wit, [at the general quarter sessions of the peace, holden at ———, so continuing the record of the conviction of the party who escaped, stating it however in the past and not in the present tense; see ante, p. 52; then proceed thus:] as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void. And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the said general quarter sessions of the peace above mentioned, he the said J. N. was then and there committed to the care and custody of J. S., he the said J. S. then and still being keeper of the common jail in and for the said county of Berks, there to be [306] kept and *imprisoned in the jail aforesaid, according to and in pursuance of the judgment and sentence aforesaid; and the said J. S., him the said J. N. then and there had in the custody of him the said J. S., for the cause aforesaid, in the jail aforesaid. And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish of L. in the said county of Berks, yeoman, afterwards, and before the expiration of the six calendar months for which the said J. N. was so ordered to be imprisoned as aforesaid, and whilst the said J. N. was so in the custody of the said J. S. as such keeper of the said common jail as aforesaid, to wit, on the third day of May in the year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously [if the offence for which J. N. was convicted were a felony,] unlawfully, voluntarily, and contemptuously, did permit and suffer the said J. N. to escape, and go at large whithersoever he would, whereby the said J. N. did then and there escape out of the said prison, and go at large whithersoever he would: in contempt of our said lord the King and his laws, contrary to the duty of the said J. S. so being keeper of the jail aforesaid, in manifest hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

A voluntary escape amounts to the same offence, and is punishable in the same degree, as the offence of which the prisoner was guilty, and for which he was in custody, whether treason, felony, or trespass. The officer, however, cannot be thus punished until after the original delinquent have been found guilty or convicted; but before such conviction, he may be fined and imprisoned as for a misdemeanor. 4 Bl. Com. 130. 1 Hale, 234. 2 Hawk. c. 19. s. 22.

Evidence.

Prove the conviction of J. N., in the manner directed ante, p. 52. Prove that upon his conviction he was remanded or committed to the custody of the defendant as keeper of the common jail of the county of Berks. Prove him afterwards to have been in the custody of the defendant, in pursuance of his sentence. And lastly, prove the escape. It does not

seem to be necessary to prove that the escape was voluntary; the law, it should seem, will presume that, until the contrary appear.

SECT. 2.

BREACH OF PRISON.

Indictment for Breaking Prison.

Proceed as in the precedent, ante, p. 303, *to the words* "until *he by the course of law should be discharged," in the description of the warrant of commitment, and then proceed thus:] by virtue of which said warrant, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, the said J. N. was taken and conveyed to the said jail of Newgate, and then and there delivered to one W. S. the keeper of the said jail, and the said W. S., keeper of the said jail, then and there received him the said J. N. into his custody in the jail of Newgate aforesaid.* And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N., late of the parish of B., in the county of M., labourer, afterwards, and whilst he so remained in custody of the said W. S. keeper of the said jail, under and by virtue of the warrant aforesaid, to wit, on the twenty-seventh day of May, in the year last aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously [if he was committed for treason or felony] unlawfully, wilfully, and injuriously did break the jail of Newgate aforesaid, by then and there cutting and sawing two iron bars of the said jail, and also by then and there breaking, cutting, and removing a great quantity of stone, parcel of the wall of the jail aforesaid; by means whereof, he the said J. N. did then and there escape, and go at large whithersoever he would: to the great hindrance and obstruction of justice, in contempt of our lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. [307]

Felony, within clergy, if the defendant were in custody for treason or felony; 1 Ed. 2. st. 2. 1 Hale, 612; *fine and imprisonment, if he were in custody for any other offence.* 2 Hawk. c. 18. s. 21.

Evidence.

Prove the charge before the magistrate, and the warrant, as directed ante, p. 304. Prove that the defendant was afterwards lodged in the jail mentioned in the indictment, in the custody of the keeper; and prove that, whilst in custody there under the warrant, he broke the jail, and escaped.

The escape must be proved, if the breaking be charged as a felony; 2 Hawk. c. 18. s. 12; but otherwise, it should seem, if it be a misdemeanor only. And the breaking proved, must be an actual breaking; merely getting over the walls, or passing out through a door, or the like, is an escape only, and not a breach of prison; 1 Hale, 611, and see R. *v.* Burridge, 3 P. Wms. 439; and on this account, it should seem, that the manner of the breaking should be stated in the indictment, as in the above precedent, in order that the court may see that it was such as is necessary in law to constitute a breach of prison.

*Every place where a man's person is lawfully imprisoned, [308]

whether upon an accusation or after conviction, such as the common jail, the constable's house, the stocks, &c., is a prison within the meaning of the statute ; 2 Hawk. c. 18. s. 4 ; and as described in the indictment, so it must be proved.

Although it is not material, in this case, whether the defendant were guilty of the offence for which he was imprisoned, or not, 2 Hawk. c. 18. s. 16, yet if he can prove that no such offence was ever actually committed, or that he was arrested and detained without any reasonable cause of suspicion against him, 1 Hale, 610, 611, or if he have been subsequently indicted for the offence, and acquitted, this will be a sufficient defence to the indictment for breach of prison.

Indictment for conveying Files to a Prisoner, to enable him to Escape.

Proceed as in the last precedent, to the *, and then continue the indictment thus :] And the jurors aforesaid, upon their oath aforesaid, do further present, that J. T., late of the parish of B., in the county of M., labourer, afterwards, and whilst the said J. N was and remained in the custody of the said W. S., in the jail of Newgate aforesaid, to wit, on the twenty-seventh day of May, in the year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously and unlawfully did convey and cause to be conveyed into the said jail of Newgate, two steel files, being instruments proper to facilitate the escape of prisoners ; and the same files, being such instruments as aforesaid, then and there feloniously did deliver and cause to be delivered to the said J. N., (he the said J. N. then and there being a prisoner in the said jail, and then and there lawfully detained for the felony and rape aforesaid in the said warrant of commitment above mentioned and expressed,) without the consent or privity of the keeper or underkeeper of the said jail of Newgate ; which said files, being such instruments as aforesaid, were then and there so conveyed into the said jail, and delivered to the said J. N. by the said J. T. as aforesaid, with the felonious intent to aid and assist the said J. N., so being such prisoner and in custody as aforesaid, to escape and attempt to escape from and out of the said jail : against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, transportation for seven years, if the prisoner were at the time convicted of treason or felony, or committed for treason or felony expressed in the warrant ; misdemeanor, fine and imprisonment, if convicted or committed for any other offence (petit larceny included,) or for a debt, damages, or costs in a civil case amounting to 100*l.* 16 G. 2. c. [809] 31. s. 2. Aiding and assisting a prisoner * to attempt an escape from jail, although no escape be actually made, is punishable in the same manner. Id. s. 1. And aiding or assisting a prisoner in custody for treason or felony (petit larceny excepted) to make his escape from the constable or officer conveying him under a warrant to prison, or from a person conveying him to a ship for transportation, is felony, transportation for seven years. 16 G. 2. c. 31. s. 3.

If the prisoner were convicted, at the time the files were conveyed to him, state it accordingly. See the precedent, ante, p. 305.

Evidence.

Prove the charge before the magistrate, the warrant, and that J. N. was in custody of W. S. in the jail of Newgate, under the warrant. Where the commitment was *on suspicion* of felony, it was holden not to be within

the act; for the act extends only to cases where the offence is clearly and plainly expressed in the warrant, or where the prisoner stands convicted of it. R. *v.* Walker, 1 Leach, 97, and see Id. 98 n. 363.

Prove also that whilst J. N. was so in custody under the warrant, the defendant conveyed one or more files to him; and prove that such files were calculated to facilitate his escape, by filing his irons, or the window bars, or the like.

And lastly, prove the offence to have been committed within one year next before the commencement of the prosecution. 16 G. 2. c. 31. s. 4.

Sect. 3.

RESCUE.

Indictment for a Rescue of a Felon from a Constable.

State the charge before the magistrate, the warrant, the delivery of it to the constable, and J. N.'s being in his custody under it, as in the precedent, ante, p. 303, to the words "together with the warrant aforesaid," inclusive. Then proceed thus:] And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N., late of the parish of B., in the county of M., labourer, and J. T., late of the same place, labourer, afterwards, and whilst the said J. N. was in the custody of the said J. S. under the said warrant as aforesaid, and whilst the said J. S. was conveying the said J. N. under and by virtue of the said warrant, to the said jail of Newgate, to wit, on the day and year last aforesaid, with force and arms, at the parish last aforesaid, in and upon the said J. S. (then and there being *constable as aforesaid, and then [310] and there lawfully having the said J. N. in his custody by virtue of the said warrant, for the cause aforesaid) in the due execution of his said office then and there being, did make an assault, and him the said J. S. then and there did beat, wound, and ill treat; and that the said J. T. the said J. N. out of the custody of the said J. S., and against the will of him the said J. S., then and there unlawfully and forcibly did rescue, and put at large to go whithersoever he would; and that the said J. N., himself out of the custody of the said J. S., and against the will of him the said J. S., then and there unlawfully and forcibly did rescue and put at large to go whithersoever he would: to the great hindrance of justice, in contempt of our said lord the King and his laws, to the evil example of all others in like case offending, and against the peace of our Lord the King, his crown and dignity.

Fine and imprisonment, as for a misdemeanor, if the party rescued be not convicted of the offence for which he was in custody; 2 Hawk. c. 21. s. 8; *but if convicted, then if for high treason, the rescue is high treason; if for felony, felony within clergy; if for a misdemeanor, a misdemeanor;* 1 Hale, 607. *And if the rescuers be convicted of felony, the court, at its discretion, may adjudge them to be transported for seven years; or to be imprisoned, or imprisoned and kept to hard labour, for not less than one, and not exceeding three years.* 1 & 2 G. 4. c. 88. s. 1. *Rescuing persons in custody for an offence against the black act, is felony, death.* 9 G. 1. c. 22. s. 1. *Rescuing, or attempting to rescue a person convicted of murder, whilst proceeding to execution, or rescuing out of prison a person committed or convicted for murder, is felony, death.* 25 G. 2. c. 37. s. 9. *Assaulting*

or beating a constable, in order to obstruct, resist, or prevent the apprehension of a person for felony, is, besides the ordinary punishments for misdemeanors, punishable with imprisonment and hard labour for a time not less than six months, and not exceeding two years. 1 & 2 G. 4. c. 88. s. 2.

See a precedent of an indictment for rescuing a distress for rent, Cro. Cir. Com. 409; and for rescuing cattle (taking damage feasant) out of a pound. Id. 410.

Evidence.

Prove the charge before the magistrate, the warrant, and that J. N. was in the custody of J. S. under the warrant. And prove that whilst so in custody, the defendant forcibly rescued him, as stated in the indictment.

As to evidence for the defendant, it may be observed that any circumstances that will excuse a breach of prison, will excuse a rescue. See ante, p. 308, and 2 Hawk. c. 21. s. 1, 2.

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[311] *Sect. 4.

RETURNING FROM TRANSPORTATION.

Indictment for Returning from Transportation.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that heretofore, to wit, [at the general quarter sessions of the peace, holden at ———, *so continuing the record of the conviction for the offence for which the defendant was transported, to the judgment of transportation inclusive, stating it however in the past and not in the present tense; see ante, p.* 52; *and then proceed thus:*] as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void. And the jurors aforesaid upon their oath aforesaid, do further present, that the said J. S. afterwards, that is to say, after he the said J. S. was so ordered to be transported as aforesaid, and before the expiration of the term of seven years for which he the said J. S. was so ordered to be transported as aforesaid, to wit, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, feloniously and unlawfully, and without any lawful cause or excuse whatsoever, was at large within the united kingdom of Great Britain and Ireland, to wit, at the parish of B., in the county of M., aforesaid: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 56 G. 3. c. 27. s. 8. 6 G. 1. c. 23. s. 6. 16 G. 2. c. 15. s. 1. 8 G. 3. c. 15. s. 1. There are several other statutes in particular cases, which enact the same in substance. The venue may be laid either in the county where the defendant was apprehended, or in the county whence he was ordered to be transported. 6 G. 1. c. 23. s. 7.

Evidence.

Prove the former conviction by a transcript of it, which the clerk of assize or clerk of the peace for the county where the defendant was be-

fore convicted, must give upon application, and which is made good evidence of the conviction by stat. 6 G. 1. c. 23. s. 7, and 56 G. 3. c. 27. s. 8. You must also prove the prisoner's identity.

Prove also that the defendant was at large before the expiration of the seven years for which he was ordered to be transported; and it is for the defendant to shew that he was justified in being at large, as, for instance, that he was pardoned, or the like.

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*Sect. 5. [312]

PERJURY.

Indictment for Perjury in an affidavit to hold to Bail.

London, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of London, grocer, wickedly and maliciously contriving and intending unjustly to aggrieve one J. N., and him the said J. N. to put to great expense, and also unjustly and maliciously to cause him the said J. N. to be arrested for the sum of fifty pounds, by virtue of a certain writ of our lord the King called a latitat, to be sued out and prosecuted at the suit of him the said J. S., on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at London aforesaid, at the parish of Saint Dunstan in the west, in the ward of Farringdon without, came in his proper person before Sir W. D. B., knight, then being one of the justices of the court of our lord the King before the King himself, and then and there produced a certain affidavit in writing of him the said J. S., and then and there before the said Sir W. D. B., knight, in due form of law was sworn and took his corporal oath upon the Holy Gospel of God concerning the truth of the matters contained in the said affidavit, (he the said Sir W. D. B., knight, then and there having a lawful and competent power and authority to administer the said oath to the said J. S. in that behalf;) and that the said J. S., being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there, upon his oath aforesaid, before the said Sir W. D. B., knight, (the said Sir W. D. B., knight, then and there having a lawful and competent power and authority to administer the said oath to the said J. S. in that behalf) falsely, corruptly, knowingly, wilfully, and maliciously, in and by his said affidavit in writing, did depose and swear (amongst other things,) in substance, and to the effect following, that is to say, that J. N. (meaning the said J. N. above mentioned) was then justly and truly indebted unto him the said J. S. in the sum of fifty pounds for goods sold and delivered by the said J. S. to the said J. N. and at his (meaning the said J. N.'s) request; as in and by the said affidavit of the said J. S., affiled in the said court of our said lord the King before the King himself, more fully and at large appears: Whereas in truth and in fact the said J. N., at the time the said J. S. took his said oath and made his affidavit aforesaid, was not indebted to him the said J. S. in the sum of fifty pounds for goods sold *and delivered by the said J. S. [313] to the said J. N.; and whereas in truth and in fact the said J. N. was not then indebted to the said J. S. in the sum of fifty pounds on any account whatsoever; and whereas in truth and in fact the said J. N. was not then indebted to the said J. S. in any sum whatsoever, on any

account whatsoever: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the said third day of May, in the year last aforesaid, at London aforesaid, in the parish and ward aforesaid, before the said Sir W. D. B., knight, (he the said Sir W. D. B., knight, then and there having such power and authority as aforesaid) by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury: to the great displeasure of Almighty God, in contempt of our said lord the King and his laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. See the precedents, 4 Went. 230. 249. 271. Cro. Cir. Com. 339, 340. 356. It is not necessary to set out the jurat of the affidavit; R. *v.* Embden, 9 East, 437; nor is it necessary to state or prove that the affidavit was affiled in or exhibited to the court, or in any manner used by the defendant or others. R. *v.* Crosby, 7 T. R. 315.

Perjury is punishable at common law with fine, imprisonment, and pillory, at the discretion of the court; and by stat. 2 G. 2. c. 25. s. 2, *the judge may order the party to be transported, or to be imprisoned and kept to hard labour in the house of correction, for a term not exceeding seven years. The false affirmation of a quaker, is punishable in the same manner.* 22 G. 2. c. 46. s. 36.

An oath or affirmation, to amount to perjury, must be taken in a judicial proceeding, before a competent jurisdiction; it must also be material to the question depending, and false. R. *v.* Aylett, 1 T. R. 69.

1. It must be taken in a judicial proceeding: as, if he swear falsely, when examined as a witness at a trial; or in an answer to a bill in equity; 5 Mod. 348. 3 Inst. 166: or in depositions in a court of equity; 5 Mod. 348; or in an affidavit in the courts of King's Bench, Common Pleas, Chancery, &c.; 5 Mod. 348. 1 Show, 335. 397. 1 Ro. Rep. 79. Per Coke, C. J.; or upon a wager of law; Noy, 128; or upon a commission for the examination of witnesses; Cro. Car. 99. See 1 B. & P. 240; or in justifying bail in any of the courts; or upon an examination before a magistrate; or in a judicial proceeding in a court baron, 5 Mod. 348. 1 Mod. 55, per Twisden, J., or ecclesiastical court, 5 Mod. 348, or any other court, whether of record or not. See 1 Hawk. c. 69. s. 3. It is doubted if perjury can be assigned upon the oath made for the purpose of obtaining a marriage license; R. *v.* Alexander, 1 Leach, 63, but see 1 Vent. 370; and therefore it is usual in such a case,
[314] to *indict as for a mere misdemeanor at common law. But perjury may be assigned upon the oath against simony, taken by clergymen at the time of their institution. R. *v.* Lewis, 1 Str. 70.

2. It must be taken before a competent jurisdiction; for if it appear to have been taken before a person who had no lawful authority to administer it, 3 Inst. 165, 166, or who had no jurisdiction of the cause, 3 Inst. 166. Yelv. 111, the defendant must be acquitted. See R. *v.* Crosby, 7 T. R. 315. 1 Hawk. c. 69. s. 3, 4. Bac. Abr. Perjury, A.

3. That part of the oath, upon which the perjury is assigned, must be material to the matter then under the consideration of the court. 3 Inst. 167. As, for instance, if a witness be asked whether goods were paid for on a particular day, and he answer in the affirmative,—if the goods were really paid for, though not on that particular day, it will not be perjury, 2 Ro. Rep. 41, 42, unless the day be material. So, if a man swear that J. S. beat another with his sword, and it turn out that he beat him with a stick, this is not perjury; for all that was material was the battery. Het

ley, 97. See 1 Hawk. c. 69. s. 8. But perjury may be assigned upon a man's testimony as to the credit of a witness. 2 Salk. 514. Or he may be perjured in his answer to a bill in equity, though it be in a matter not charged by the bill. 5 Mod. 348. Semb. 1 Sid. 274. 106.

4. It must be either false in fact; or, if true, the defendant must not have known it to be so. 1 Hawk. c. 69. s. 6. 3 Inst. 166. Palmer, 294. As, for instance, if a man swear that J. N. revoked his will in his presence, —if he really had revoked it, but it were unknown to the witness that he had done so, it is perjury. Hetley, 97. And a man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he must know to be false. Per Lord Mansfield, in R. *v.* Pedley, 1 Leach, 327. See 1 Hawk. c. 69. s. 7. 3 Inst. 166. 1 Sid. 419, cont.

5. The false oath must be taken deliberately and intentionally; for if done from inadvertence or mistake, it cannot amount to voluntary and corrupt perjury. 1 Hawk. c. 69. s. 2. Therefore, where perjury is assigned on an answer in equity, or an affidavit, &c., the part on which the perjury is assigned, may be explained by another part, or even by a subsequent answer, &c. 1 Sid. 419. Com. Dig. Just. of peace, B. 102.

Now, all these things must appear upon the face of the indictment, and be proved as laid. In the introductory part of the indictment, circumstances are stated which shew that the oath was taken in a judicial proceeding, before a competent jurisdiction, and was material to the matter then before the court; the oath is then set out; and the perjury is then assigned upon it, that is, some one or more of the affirmative *assertions in it are negatived, or the negative assertions contra- [315] dicted by the opposite affirmative.

If it appear sufficiently from the oath itself, that it was material to the matter then before the court, it is unnecessary to aver that fact: See 2 Stark. N. P. C. 423 n.: but if it do not appear, then the materiality of that part of the oath upon which perjury is assigned must be averred; R. *v.* M'Heron, 5 T. R. 316, cit.; as, for instance, if the perjury were committed upon the trial of a cause, it should be averred that it then and there became a material question whether J. N. was at B. on such a day, and then it may be stated that J. S. swore at that trial, that J. N. was not at B. on that day; and lastly proceed to assign the perjury. This mode of pleading will at once shew the materiality of the evidence; and it is deemed sufficient, without setting out so much of the proceedings of the former trial as might otherwise be necessary to shew that it was material. R. *v.* Dowling, 5 T. R. 318.

The oath is next set out, together with such inuendoes as may be necessary to render the matter of it intelligible, and to connect it clearly with the assignments of perjury contained in the subsequent part of the indictment. As to the use and necessity of an inuendo generally, see ante, p. 288, 289, and see 1 T. R. 70.

And lastly, as to the assignments of perjury,—they must be by special averment, negativing the oath, or some part or parts of it; merely saying that the defendant falsely swore so and so, would be bad, and even perhaps error. See R. *v.* Perrot, ante, p. 160.

As to the certainty with which the offence must be set out in the indictment,—formerly such a degree of nicety was required, that it was difficult to obtain a conviction. But now, by stat. 23 G. 2. c. 11. s. 1; it is sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken, (averring such court or person to have a competent authority to administer the same,) together with the proper averment or averments to falsify the

matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, other than as aforesaid, and without setting out the commission or authority of the court or person before whom the perjury was committed. If, however, the prosecutor undertake to set out more of the proceedings than he need, under this statute, he must do it correctly, and a variance will be fatal. 5 T. R. 317.

Evidence.

1. In this particular indictment there happens to be nothing [316] *in the introductory part of it that requires proof; but in other cases, it may be laid down as a general rule, that every part of the introductory part of the indictment, which cannot be rejected as surplusage, must be proved in substance as laid.

2. The matter sworn, must be proved. If in writing, it must be produced. To support the present indictment, get the filacer or other officer in whose custody the affidavit is, to produce it at the trial; and prove, either directly or circumstantially, that it was sworn to by the defendant; as, for instance, that the name subscribed to it is of the defendant's handwriting, and that it was at his suit J. S. was holden to bail, or the like. Where perjury is assigned upon an answer to a bill in equity, it is sufficient, after producing the bill or a copy of it, to produce the answer, and prove either that the defendant was sworn to it, or that the signature to it is of the defendant's handwriting, and that the name subscribed to the jurat is the name and handwriting of a master or other person having authority for that purpose. R. *v.* Morris, 2 Bur. 1189. R. *v.* Benson, 2 Camp. 508. And the same as to depositions in equity, see ante, p. 83, and other similar cases, so at least as to throw upon the defendant the onus of proving that he was personated. 2 Bur. 1189. And it is necessary to prove in substance the whole of what is set out in the indictment as having been sworn by the defendant; setting out a part only, it seems, is not sufficient. R. *v.* Jones, Peake, 37. Also, it must be proved literally or substantially as set out; R. *v.* Leefe, 2 Camp, 134; any variance in substance between the indictment and evidence, in this respect, will be fatal, See R. *v.* Taylor, 1 Camp. 404, and see 2 Id. 509. 1 Stark. N. P. C. 518. 1 T. R. 237 n. 240 n. 14 East, 218 n. So, if it be stated that the defendant was sworn on the Gospels, and it be proved that he was sworn in a different manner, according to the custom of his country, the variance will be fatal. R. *v.* M'Arthur, Peake, 155. To prove that the person who administered the oath, had authority to do so, it is merely necessary to prove that he performed the duties of a certain office (without shewing his appointment,) R. *v.* Verelst, 3 Camp. 432, and (if the court will not judicially notice it) that the person lawfully exercising the duties of that office has authority to administer an oath in such a case.

3. Some one or more of the assignments of perjury must be proved by two witnesses; see ante, p. 104; and the assignment so proved, must be upon a part of the matter sworn which was material to the matter before the court at the time the oath was taken. Also, it must not only be proved that the matter sworn, or part of it, is false, but it must appear, either directly or from circumstances, that the defendant knew it to be so, and that he swore to it deliberately. See ante, p. 314.

**Indictment for Perjury upon a Trial at the Assizes.*

Surry, to wit: The jurors for our lord the King, upon their oath present, that heretofore, to wit, at the assizes holden for the county of Surry, on the thirtieth day of March, in the third year of the reign of our sovereign lord George the Fourth, at Kingston upon Thames in the said county, before Sir J. B., knight, one of the justices of our said lord the King, of the court of our lord the King, before the King himself, and Sir J. A. P., knight, one of the justices of our said lord the King, of the bench at Westminster, justices of our said lord the King, assigned to take the assizes in and for the said county of Surry, a certain issue between one J. L. and one J. W. in a certain plea of trespass and assault, wherein the said J. L. was plaintiff, and the said J. W. defendant, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid; upon which said trial, J. S. late of the parish of B., in the county of S., labourer, then and there appeared as a witness for and on behalf of the said J. W. the defendant in the plea above mentioned, and was then and there duly sworn and took his corporal oath upon the Holy Gospel of God, before the said Sir J. B., knight, and the said Sir J. A. P., knight, so being such justices as aforesaid, that the evidence which he the said J. S. should give to the court there, and to the said jury so sworn as aforesaid, touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth, (they the said Sir J. B., knight, and Sir J. A. P., knight, justices as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said J. S. in that behalf. And the jurors first aforesaid, upon their oath aforesaid, do further present, that at and upon the trial of the said issue so joined between the said parties as aforesaid, it then and there became and was a material question whether the said J. W. assaulted and beat the said J. L. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., being so sworn as aforesaid, not having the fear of God before his eyes, nor regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to prevent the due course of law and justice, and unjustly to aggrieve the said J. L., the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses, then and there on the trial of the said issue, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said jurors so sworn as aforesaid, and before the said Sir J. B., knight, and Sir J. A. P., knight, justices *as [318] aforesaid, did depose and swear (amongst other things) in substance and to the effect following, that is to say, that [here set out the evidence, namely, the examination or cross-examination (upon whichever you mean to assign the perjury, see R. *v.* Dowlin, Peake, 170,) of J. S., together with the necessary inuendoes:] Whereas in truth and in fact, [&c. &c. proceeding to assign the perjury, as in the precedent, ante, p. 312.] And so the jurors aforesaid, upon their oath aforesaid, do say, &c. &c. as in the precedent, ante, p. 313. See the precedents, 4 Went. 266. 273. Cro. Circ. Com. 351. 353. And see, where the perjury was committed on the trial of an indictment or information, 4 Went. 239. 275. 6 Id. 396. Cro. Circ. Com. 359. 362. 364. Where perjury is committed by a witness before any justice of assize, nisi prius, or jail-delivery, or of the Great Sessions of Wales, or the Counties Palatine, the judge is

empowered to order the party to be prosecuted, and to assign counsel for that purpose, and such prosecution shall be carried on without payment of fees, &c. 23 G. 2. c. 11. s. 3.

Evidence.

Produce an office copy of the record of the trial, at which the perjury is alleged to have taken place; or, at least, produce the *nisi prius* record; see ante, p. 81; in order to prove that such a trial took place. Then prove the evidence the defendant gave upon it, by the testimony of some person who was present at the trial. And lastly, prove the assignments of perjury by two witnesses, as directed ante, p. 316.

Indictment for Perjury, upon a Complaint before a Magistrate.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., surgeon, wickedly and maliciously contriving and intending unjustly to aggrieve one J. N., and him the said J. N. to subject to the punishments, pains, and penalties by the laws of this realm provided for persons guilty of felony and larceny, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, came in his proper person before A. C., esquire, then and yet being one of the justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, and then and there before the said A. C., esquire, in due form of law was sworn and took his corporal oath upon the Holy Gospel of God (he the said A. C. then and there having a lawful and competent power and authority to administer the said
[319] oath to the said J. S. in that behalf;) and *that the said J. S. being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there, upon his oath aforesaid, before the said A. C., esquire, (the said A. C. then and there having a lawful and competent power and authority to administer the said oath to the said J. S. in that behalf as aforesaid,) upon a certain information, intituled, "Middlesex, to wit. The information of Mr. J. S. [&c. setting out the title of the information,] falsely, corruptly, knowingly, wilfully, and maliciously did say, depose, swear, and give information in writing (amongst other things,) in substance and to the effect following, that is to say, This informant (meaning the said J. S.) upon his oath saith, [so proceeding to set out the defendant's information upon oath before A. C., with the necessary inuendoes; and then proceed to assign the perjury,] Whereas in truth and in fact, &c. as ante, p. 312, 313; then conclude, And so the jurors aforesaid, upon their oath aforesaid, do say, &c. as ante, p. 313. See the precedents, 4 Went. 232. 244. Cro. Circ. Com. 332. And see as to the indictment and evidence, ante, p. 313. et seq.

See the following precedents:—of an indictment for perjury upon the hearing of an appeal at the Quarter Sessions, Cro. Circ. Com. 334; in affidavits upon several occasions, Id. 336. 365. 4 Went. 242. 246. 253. 258. 260. 263, 264. 277, 278. 281. 287; in an affidavit by a petitioning creditor, C. C. C. 345; in justifying bail, 6 Went. 423, 424; upon executing a writ of enquiry, C. C. C. 361; in an answer to a bill in equity, C. C. C. 342. 357; in depositions in equity, 4 Went. 292; in depositions

in the ecclesiastical court, 4 Went. 235. 297; before arbitrators, 4 Went. 256; before an election committee of the House of Commons, 4 Went. 300.

Indictment for Subornation of Perjury.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that heretofore, to wit, in Trinity term, in the second year of the reign of our sovereign lord George the Fourth, a certain issue was joined in the court of our lord the King, before the King himself, (the said court then and still being holden at Westminster in the county of Middlesex) between one J. L. and one J. W., in a certain plea of trespass and assault, in which the said J. L. was plaintiff, and the said J. W. defendant. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and before the trial of the said issue as hereinafter mentioned, and whilst the same was depending, to wit, on the third day of July, in the year aforesaid, J. S., late of the parish of B., in the county of M., tailor, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and *wickedly contriving and intending to pervert the due course of law and justice, and wickedly and maliciously contriving and intending unjustly to aggrieve the said J. L. the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses, then and there, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, corruptly, wickedly, and maliciously did solicit, suborn, instigate, and endeavour to persuade one J. N. to be and appear as a witness at the trial of the said issue, for and on behalf of the said J. W. the defendant in the said issue, and upon the said trial falsely to swear and give in evidence, to and before the jurors which should be sworn to try the issue aforesaid, certain matters material and relevant to the said issue, and to the matters therein and thereby put in issue, in substance and to the effect following, that is to say; that [the said J. W. (meaning the defendant in the issue aforesaid,) did, on a certain day then past, to wit, on the tenth day of April in the year aforesaid, beat, wound, and bruise the said J. L., (meaning the plaintiff in the issue aforesaid), and did knock him the said J. L. down, and with a large stick did then and there beat, wound, and bruise, and greatly disfigure the said J. L. whilst he was so down.] And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the sittings at *nisi prius* holden after Trinity term aforesaid, at Westminster, in the county aforesaid, before the Right Honourable Sir Charles Abbot, knight, his Majesty's chief justice assigned to hold pleas in the court of our said lord the King, before the King himself, to wit, on the day and year last aforesaid, at Westminster aforesaid, in the county aforesaid, the issue aforesaid, came on to be tried, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid; upon which said trial the said J. N., in consequence, and by the means, encouragement, and effect of the said wicked and corrupt subornation and procurement of the said J. S., did then and there appear as a witness for and on behalf of the said J. W. the defendant in the plea above mentioned, and was then and there duly sworn, and took his corporal oath upon the Holy Gospel of God before the said Sir Charles Abbot, knight, his Majesty's chief justice as aforesaid, that the evidence which he the said J. N. should give to the court there, and to the jury so sworn as aforesaid,

[320]

touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth, (he the said Sir Charles Abbot, knight, chief justice as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said J. N. in that behalf;) and that at and upon the trial of the said
[321] issue so joined between the said parties as *aforesaid, it then and there became and was a material question, whether the said J. W. assaulted and beat the said J. L.; and the said J. N., being so sworn as aforesaid, then and there at the trial of the said issue, upon his oath aforesaid, falsely, corruptly, and wilfully, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said Sir Charles Abbot, knight, chief justice as aforesaid, did depose and swear (amongst other things) in substance and to the effect following, that is to say; that [here set out J. N.'s evidence, in substance the same as is above stated where the subornation is charged:] Whereas in truth and in fact the said J. W. did not [&c. so proceeding to assign the perjury, as in the precedent, ante, p. 312.;] and whereas in truth and in fact the said J. S., at the time he so solicited, suborned, instigated, and endeavoured to persuade the said J. N., falsely and corruptly to swear as aforesaid, well knew that [&c. pursuing the words in the assignments of perjury:] And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the said third day of July, in the second year of the reign aforesaid, at the parish aforesaid, in the county aforesaid, did unlawfully, corruptly, wickedly, and maliciously suborn and procure the said J. N. to commit wilful and corrupt perjury in and by his oath aforesaid, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said Sir Charles Abbot, knight, chief justice as aforesaid, (the said Sir Charles Abbot, knight, then and there having sufficient and competent power and authority to administer the said oath to the said J. N.:) to the great displeasure of Almighty God, to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. See the precedents C. C. C. 379, 380. 4 Went. 234. 250. By stat. 23 G. 2. c. 11. s. 2, in an indictment for subornation, it is "sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

Evidence.

Prove the perjury committed, as directed ante, p. 315; for unless this be proved, the defendant cannot be found guilty of the subornation; 1 Hawk. c. 69. s. 10; and the mere production of the record of J. N.'s conviction for the perjury (if he were convicted) would not, it seems, be sufficient evidence of the perjury having been committed. R. *v.* Reilly, 1 Leach, 454.

And prove the previous subornation, as laid in the indictment,
[322] *namely, that the defendant solicited or procured J. N. to prove so and so upon the trial of the issue, knowing the same to be false, or that J. N. by giving such evidence, would be committing perjury.

SECT. 6.

BRIBERY.

Indictment for Attempting to Bribe a Constable.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that heretofore, to wit, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish of B., in the county of M., one A. C., esquire, then and yet being one of the justices of our said lord the King assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, did then and there make a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to all constables and other peace officers of the said county, and especially to J. N., thereby commanding them, upon sight thereof, to take and bring before him the said A. C. so being such justice as aforesaid, or some other of his Majesty's justices of the peace for the said county, the body of D. F., late of the parish aforesaid, in the county aforesaid, to answer [&c. &c. as in the warrant;] and which said warrant afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, was delivered to the said J. N., then being one of the constables of the same parish, to be executed in due form of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., late of the parish aforesaid, in the county aforesaid, labourer, well knowing the premises, but contriving and unlawfully intending to pervert the due course of law and justice, and to prevent the said D. F. from being arrested and taken under and by virtue of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, wickedly, and corruptly did offer unto the said J. N., so being constable as aforesaid, and having in his custody and possession the said warrant so delivered to him to be executed as aforesaid, the sum of ten pounds, if he the said J. N. would refrain from executing the said warrant, and from taking and arresting the said D. F. under and by virtue of the same, for and during fourteen days *from [323] that time, that is to say, from the time he the said J. S. so offered the said sum of ten pounds to the said J. N. as aforesaid: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. N., on the said third day of May, in the year aforesaid, at the parish aforesaid, in the county aforesaid, in manner and form aforesaid, did attempt and endeavour to bribe the said J. N., so being constable as aforesaid, to neglect and omit to do his duty as such constable, and to refrain from taking and arresting the said D. F. under and by virtue of the warrant aforesaid: in contempt of our lord the King and his laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Punishable with fine and imprisonment, whether the bribe were accepted or not. 3 Inst. 147, and see R. *v.* Vaughan, 4 Bur. 2500. And the same, where an officer, judicial or ministerial, takes a bribe. Id. and see 20 Ed. 3. c. 1. Com Dig. Officer, 1. The text books in general confine the offence of bribery to a bribery of judicial officers; but this definition of the offence seems too narrow and confined. See R. *v.* Beale, 1 East, 183, cit. R. *v.* Vaughan, 4 Bur. 2494.

Evidence.

Prove the warrant, and the delivery of it to J. N.; and prove that J. S. knew that J. N. had the warrant, and offered him 10*l.* to refrain from executing it, as stated in the indictment.

SECT. 7.

EXTORTION.

Indictment against a Constable for Extortion.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., baker, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, then being one of the constables of the said parish, at the parish aforesaid, in the county aforesaid, did take and arrest one J. N., by colour of a certain warrant, commonly called a bench warrant, which he the said J. S. then and there alleged to be in his possession; and that the said J. S. afterwards, and whilst the said J. N. so remained in his custody, as aforesaid, to wit, on the day and
[324] year aforesaid, at the parish aforesaid, in the *county aforesaid, unlawfully, corruptly, deceitfully, extorsively, and by colour of his said office, did extort, receive, and take of and from the said J. N., the sum of five shillings, as and for a fee due to him the said J. S., as such constable as aforesaid, for the obtaining and discharging of the said warrant, as he the said J. S. then and there alleged; whereas in truth and in fact, no fee whatever was then due from the said J. N. to the said J. S. as such constable as aforesaid in that behalf: in contempt of our said lord the King and his laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. The venue may be laid in any county. 31 El. c. 5. s. 4. See the precedents, Cro. Circ. Com. 193, 194, 195. 4 Went. 146, and see 3 Inst. 148, 149. 2 L. Raym. 1265. 2 Salk. 680. 4 Camp 379.

Fine or imprisonment, or both. And it is equally extortion, where a greater fee is exacted than what is legally due, as where money is exacted as a fee where none whatever is payable. See 2 Salk. 680. 1 Hawk. c. 68. s. 1.

Evidence.

Prove the arrest, and prove that the defendant exacted money as a fee due to him, as stated in the indictment. The sum stated is not material; proof of a less sum will maintain the indictment. 1 L. Raym. 149, and see 6 T. R. 267.

SECT. 8.

MISCONDUCT OF OFFICERS OF JUSTICE.

Indictment against a Constable for Not Conveying an Offender to Prison.

*Proceed as in the precedent, ante, p. 303, as far as the * ; and then proceed thus.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish aforesaid, in the county aforesaid, baker, so being one of the constables of the said parish as aforesaid, and being so commanded by the said A. C. the said justice, as aforesaid, then and there unlawfully and contemptuously did neglect and refuse to convey the said J. N. to the said jail of Newgate, together with the warrant aforesaid, as he the said J. S., by virtue of his office aforesaid, by law should and ought to have done : to the great hindrance of justice, to the evil example of all others in the like case offending, and against the peace *of our lord the King, his crown [325] and dignity. See the precedents, Cro. Circ. Com. 143. 151. 170.

Every malfeasance or culpable nonfeasance of an officer of justice, with relation to his office, is a misdemeanor, and punishable with fine or imprisonment, or both. See 1 Salk. 380. Cro. El. 654.

Evidence.

Prove the charge before the magistrate, the warrant, and the delivery of it to the defendant, as directed ante, p. 304. And prove that the defendant neglected or refused to convey the offender to prison, in pursuance of the warrant. It is unnecessary to prove the defendant's appointment as constable ; proof that he was accustomed to act as such, will be sufficient. Ante, p. 251.

Indictment against a Magistrate for Committing, in a Case where he had no Jurisdiction.

Middlesex, to wit : The jurors for our lord the King upon their oath present, that on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish of B., in the county of M., one T. C., then being one of the constables of the said parish, brought one J. N. before J. S., esquire, then and yet being one of the justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county ; and the said J. N. then and there was charged before the said J. S. with having committed a certain supposed misdemeanor, in having vilified the character and hurt the trade of one A. C. of the parish aforesaid, miller ; and the said J. N. was then and there examined before the said J. S., as such justice as aforesaid, touching the said supposed offence so to him charged as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish aforesaid, in the county aforesaid, esquire, being such justice as aforesaid, wickedly and maliciously contriving and intending to oppress, injure, and aggrieve the said J. N. in this behalf, and to put him to great charge and expense, and to cause him to undergo and suffer great pain, torture, and anguish of body and mind, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did order and direct that

the said J. N. should find sureties for his personal appearance at the then next general quarter sessions of the peace of our said lord the King, to be holden in and for the said county of M., to answer the said [326] charge; and because the said J. N. did not, and could *not conveniently, find such sureties as aforesaid, he the said J. S. being such justice as aforesaid, wickedly and maliciously contriving and intending as aforesaid, wrongfully, unjustly, and maliciously, and contrary to the laws of this realm, then and there (by virtue and under colour of a certain warrant under his hand and seal as such justice as aforesaid) did commit the said J. N. a prisoner to a certain prison called the House of Correction, situate at the parish aforesaid, in the county aforesaid, to be there safely kept until he the said J. N. should find such sureties as aforesaid, and until he should be further examined concerning the premises; and then and there ordered, directed, and commanded the then keeper of the said prison to keep the said J. N. under close confinement in the said prison, and to deny him the use of pen, ink, and paper, and to allow no letter to be delivered to or from the said J. N., and also to allow no person to see or speak to him the said J. N. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., by virtue and under colour of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, and from thence for a long space of time, to wit, for the space of ten days then next following, at the parish aforesaid, in the county aforesaid, wrongfully, unjustly, and maliciously, and contrary to the laws of this realm, did cause and procure the said J. N. to be closely confined and imprisoned in the said prison, and to be denied the use of pen, ink, and paper, and to be restrained from all communication with his relations and friends, to wit, at the parish aforesaid, in the county aforesaid; whereby the said J. N. during all that time underwent and suffered great pain, torture, and anguish of body and mind, and was deprived of his liberty, and prevented from finding such sureties as aforesaid, and was put to great charge and expense in and about obtaining his discharge and release from the said commitment and imprisonment: to the great scandal of the administration of justice in this kingdom, in contempt of our lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *Where magistrates are guilty of oppression, or other wilful malfeasance in the execution of their duties, they are generally proceeded against by information.* But such an information can readily be framed from this precedent, by observing the forms given, ante, p. 37. 42. See the precedents, Cro. Circ. Com. 242. 244. 4 Went. 364. 418. 424. 6 Went. 455. See also a precedent of an indictment against a coroner for refusing to take an inquisition, Cro. Circ. Com. 170.

Fine or imprisonment, or both.

Evidence.

[327] Prove the charge before J. S., the warrant, &c., and the *imprisonment; together with any circumstances of aggravation laid in the indictment. Also, if the case will admit of it, evidence may be given of any circumstances which indicate that the commitment proceeded from malice, or other undue motive upon the part of the magistrate. See R. *v.* Sainsbury, 4 T. R. 451.

SECT. 9.

NOT OBEYING THE ORDERS OF A MAGISTRATE.

Indictment against a High Constable for Disobeying an Order of Sessions.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that at the general quarter sessions of the peace of our lord the King, holden for the county of Middlesex, at the New Sessions House on Clerkenwell Green, in and for the county aforesaid, by adjournment, to wit, on Saturday the twentieth day of July, in the second year of the reign of our sovereign lord George the Fourth, before F. C., J. W., W. R., and R. M., esquires, and others their fellows, justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the same county, it was ordered by the same justices and court there, that [&c. proceeding to state the order of sessions, in the past tense] as by the said order, reference being thereunto had, will more fully and at large appear; of which said order the said J. S., one of the high constables in the order aforesaid named, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, had notice. Nevertheless the said J. S., late of the parish aforesaid, in the county aforesaid, gentleman, then being one of the high constables in the order aforesaid mentioned, unlawfully and contemptuously, upon being served with the said order, did neglect and refuse to [&c. here insert what the order required of him] as by the said order he the said J. S. was required to do, nor hath he the said J. S. at any time since complied with the said order, although often requested so to do: in contempt of our lord the King and his laws, to the evil example of other persons in the like case offending, and against the peace of our lord the King, his crown and dignity. See a precedent of an indictment against an overseer of the poor, for not paying a weekly sum to a pauper in pursuance of an order of justices, Cro. Circ. Com. 327; and against the father of a bastard *child, for not [328] obeying an order of maintenance. 4 Went. 227, and see R. *v.* White and al. Cald. 183. R. *v.* Robinson, 2 Bur. 799. R. *v.* Balme, Cowp. 650. R. *v.* Fearnley, 1 T. R. 316. R. *v.* Davis, Say, 163. R. *v.* Gould, 1 Salk. 381.

Evidence.

Produce the order. Prove a personal service of a copy of it upon the defendant; and upon all the defendants, if there be more than one, and the order be joint and not several. See R. *v.* Kingston & al. 8 East, 41. And prove that the defendant did not obey the order. See R. *v.* Fearnley, 1 T. R. 316.

SECT. 10.

COMPOUNDING FELONY.

Indictment for Compounding a Felony.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that heretofore, to wit, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish of B., in the county of M., one A., the wife of J. N., feloniously stole, took, and carried away one silver spoon, of the value of twenty shillings, of the goods and chattels of one J. S., against the peace of our lord the King, his crown and dignity. And that the said J. S., late of the parish aforesaid, in the county aforesaid, labourer, well knowing the said felony to have been by the said A. so as aforesaid done and committed, but contriving and intending unlawfully and unjustly to pervert the due course of law and justice in that behalf, and to cause and procure the said A. for the felony aforesaid to escape with impunity, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, and for wicked gain's sake, did compound the said felony with the said J. N. the husband of the said A., and then and there did exact, take, receive, and have of the said J. N. the sum of twenty-six shillings, for and as a reward for compounding the said felony, and desisting from all further prosecution against the said A. for the felony aforesaid; and that the said J. S., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did thereupon desist, and from that time hitherto hath desisted, from all further prosecution of the said A. for the felony aforesaid: to the great hindrance of justice, in contempt of our lord the King
[329] and his laws, and against the peace *of our lord the King, his crown and dignity. See the precedent, 4 Went. 327.

Fine and imprisonment. See 1 Hawk. c. 59. s. 5, &c.

Evidence.

Prove the felony to have been committed by A. N., as directed ante, p. 114; and prove that J. S. received twenty-six shillings, or some part thereof, from J. N., upon an understanding that J. S. would not further prosecute A. N. for the felony; and that in fact he has not further prosecuted her since for the same.

SECT. 11.

LIBELS REFLECTING ON THE ADMINISTRATION OF JUSTICE.

Indictment for a Libel against a Judge and Jury, in the Execution of their Duties.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that heretofore, to wit, at the sittings at *nisi prius* holden in Easter term, to wit, on the twentieth day of May, in the second year of the reign of our sovereign lord George the Fourth, at Westminster, in the county of Middlesex, before the honourable Sir W. R., knight, chief baron of our said lord the King of his court of exchequer at Westminster aforesaid, a certain issue duly joined in the said court between one A. B. and one C. D., in a certain plea of trespass on the case upon promises, in which the said A. B. was plaintiff, and the said C. D. defendant, came on to be tried in due form of law, and was then and there tried, by a certain jury of the country in that behalf, duly sworn and taken between the parties aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., late of the parish of B., in the county of M., printer, being a wicked and ill disposed person, wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt, and to scandalize and vilify the said Sir W. R., knight, and the jurors by whom the said issue was so tried as aforesaid, and to cause it to be believed that [here state the effect of the libel; see ante, p. 285,] on the first day of June, in the year last aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, wickedly and maliciously did write and publish, and cause and procure to be *written and published, a certain [330] false, wicked, malicious, and scandalous libel, of and concerning the administration of justice in this kingdom, and of and concerning the trial of the said issue, and of and concerning the said Sir W. R., knight, and the jurors by whom the said issue was so tried as aforesaid, according to the tenor and effect following, that is to say: [here set out the libel, together with such inuendoes as may be requisite. See ante, p. 288, 289,] to the great scandal and reproach of the administration of justice in this kingdom, in contempt of our lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. See R. *v.* White & al., 1 Camp. 359. R. *v.* Watson & al., 2 T. R. 199. As to the evidence, see ante, p. 289—293.

Indictment for Slanderous Words to a Magistrate.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that heretofore, to wit, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish of B., in the county of M., one J. S. was brought before J. N., esquire, then and yet being one of the justices of our said lord the King, assigned to keep the peace of our said lord the King, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county; and the said J. S. was then and there charged before the said J. N., upon the oath of one A. C., that he

the said J. S., had then lately before feloniously taken, stolen, and carried away divers goods and chattels of the said A. C. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., being a scandalous and ill disposed person, and wickedly and maliciously intending and contriving to scandalize and vilify the said J. N., as such justice as aforesaid, and to bring the administration of justice in this kingdom into contempt, afterwards, and whilst the said J. N. as such justice as aforesaid was examining and taking the depositions of divers witnesses against him the said J. S. in that behalf, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our lord the King, did publish, utter, pronounce, declare, and say, with a loud voice, to the said J. N., and whilst he the said J. N. was so acting as such justice as aforesaid, "You are a scoundrel and a liar; you would hang your own father if you could make a groat by his execution:" to the great scandal and reproach of the administration of justice
[331] in this kingdom, to the great scandal and damage of the *said J. N., in contempt of our lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity.

Fine or imprisonment, or both. See R. *v.* Pocock, 2 Str. 1157. R. *v.* Weltje, 2 Camp. 142, and see 2 Salk. 698. If there be any doubt as to the words, lay them differently in different counts.

Evidence.

Prove the charge before the magistrate; and prove that whilst the magistrate was in the execution of his duty, taking the depositions of the witnesses, the defendant addressed him, and spoke the words laid in some one of the counts of the indictment. As to the proof of the words, see ante, p. 294.

*CHAPTER III.

Offences Against the Public Peace.

SECT. 1. *Riot.*
2. *Affray.*
3. *Challenge to Fight.*
4. *Threatening Letter.*
5. *Libel.*

SECT. 1.

RIOT.

Indictment for a Riot and Assault.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, J. W. late of the same, carpenter, E. W. late of the same, yeoman, together, with divers other evil disposed persons to the number of ten and more, to the jurors aforesaid unknown, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, riotously, and routously did assemble and gather together, to disturb the peace of our said lord the King; and being so then and there assembled and gathered together, in and upon one A. the wife of J. N., in the peace of God and of our lord the King then and there being, unlawfully, riotously, and routously did make an assault, and her the said A. then and there unlawfully, riotously, and routously did beat, wound, and ill treat, so that her life was greatly despaired of; and other wrongs to the said A. then and there unlawfully, riotously, and routously did: in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. See the precedents, Cro. Circ. *Com. 416, [333] et seq. 4 Went. 150. 305, et seq. You may add a count for a common assault. See ante, p. 241.

Fine or imprisonment, or both.

Evidence.

That J. S., &c., together with divers others.] It must be proved that three persons at least were engaged in this unlawful assembly and assault, otherwise the defendants must be acquitted; for unless committed by three or more, it is no riot. 2 Hawk. c. 47. s. 8. R. *v.* Scott & al., 3 Bur. 1262, 1 W. Bl. 291. 350. R. *v.* Sadbury, 1 L. Raym. 484, 2 Salk. 593.

Unlawfully, riotously, and routously did assemble.] It must be proved

that these three or more persons assembled together; and that their assembling was accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror; such as being armed, using threatening speeches, turbulent gestures, or the like. 1 Hawk. c. 65. s. 5. If an assembly of persons be not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they actually commit. Id. Lamb. 178. Dalt. c. 137. If persons meet at a fair or wake, or any other lawful and innocent occasion, and on a sudden quarrel they fight together, this is no riot, but an affray merely: but if, upon a dispute arising, they form themselves into parties, with promises of mutual assistance, and then fight, it is a riot; for in this latter case the design to break the peace is as premeditated as if they had originally met for that purpose. 1 Hawk. c. 65. s. 3.

In and upon one A., did make an assault, &c.] Prove the assault and battery, as directed ante, p. 241, 242. And this must be proved; otherwise the defendants must be acquitted. For, where persons assemble together for the purpose of doing an act, and the assembly is such as is above described,—if they do not proceed to execute their purpose, it is but an unlawful assembly, not a riot; if after so assembling they proceed to execute the act for which they assembled, but do not execute it, it is termed a rout; but if they not only assemble, but proceed to execute their design, and actually execute it, it is then a riot. 1 Hawk. c. 65. s. 1. Dalt. c. 136.

It is immaterial, however, whether the act done be unlawful or not; doing it in a manner calculated to inspire people with terror, is equally punishable, whether it be lawful or otherwise. 1 Hawk. c. 65. s. 7. Yet where the object of the assembly is lawful, it in general requires stronger evidence of the terror of the means, to induce a jury to return
[334] a verdict of *guilty, than if the object were unlawful; and it has even been holden that if a number of persons assemble for the purpose of abating a public nuisance, and appear with spades, iron crows, and other tools for that purpose, and abate it accordingly, without doing more, it is no riot, Dalt. c. 137, unless threatening language or other misbehaviour, in apparent disturbance of the peace, be at the same time used. Id.

If the offence proved against the defendants amount to a constructive levying of war (see ante, p. 270,) they must be acquitted.

Indictment for a Riot and Tumult.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, J. W. late of the same, carpenter, E. W. late of the same, yeoman, together with divers other evil disposed persons to the number of fifty and more, to the jurors aforesaid unknown, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, to wit, with sticks, staves, and other offensive weapons, at the parish aforesaid, in the county aforesaid, unlawfully, riotously, and routously, did assemble and gather together, to disturb the peace of our said lord the King; and being so assembled and gathered together, armed as last aforesaid, did then and there unlawfully, riotously, and routously, make a great noise, riot, and disturbance, and did then and there remain and continue armed as last aforesaid, making such noise, riot, and distur-

bance, for the space of an hour and more then next following, to the great disturbance and terror not only of the liege subjects of our said lord the King there being and residing, but of all other the liege subjects of our said lord the King then passing and repassing in and along the King's common highway there: in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. As to the evidence, see ante, p. 333.

Indictment against Rioters for Remaining one Hour together after Proclamation.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, J. W. late of the same, carpenter, E. W. late of the same, yeoman, together with divers other evil disposed persons to the number of twelve and more, to the jurors aforesaid unknown, on the third day of May, in the third *year of the reign of our sovereign lord [335] George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, riotously, and tumultuously did assemble together, to the disturbance of the public peace; * And the said J. S., J. W., E. W., and the said other persons to the jurors aforesaid unknown, being so unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace, as aforesaid, afterwards and whilst they were so assembled as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, one A. C. esquire, (then being one of the justices of our said lord the King assigned to keep the peace of our said lord the King, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county) as near to them the said J. S., J. W., E. W., and the said other persons to the jurors aforesaid unknown, so unlawfully, riotously, and tumultuously assembled as aforesaid, as he the said A. C., could then and there safely come, did then and there command and cause to be commanded silence to be, while proclamation was making; and that the said A. C., after that, did then and there, as near to them the said J. S., J. W., E. W., and the said other persons so assembled as aforesaid, as he the said A. C., could then and there safely come, openly and with a loud voice, did make and cause to be made proclamation (according to the form of the statute in such case made and provided) in these words following, that is to say: "Our sovereign lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the act made in the first year of the reign of King George the First, for preventing tumults and riotous assemblies. God save the King." And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W., E. W., and the said other persons to the number of twelve and more, to the jurors aforesaid unknown, being so required and commanded by the said A. C., the justice aforesaid, to disperse themselves, and peaceably to depart to their habitations, or their lawful business, did then and there, to the number of twelve and more, with force and arms, notwithstanding the said proclamation so made as aforesaid, feloniously, unlawfully, riotously, and tumultuously remain and continue together by the space of one hour after such command so made by the said proclamation as aforesaid: in contempt of our said lord the King and his laws, to the

great disturbance and terror of the quiet and peaceable subjects of our said lord the King, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

[336] **Felony, death.* 1 G. 1. st. 2. c. 5. s. 1. Opposing the making of the proclamation, is also felony, death. Id. s. 5.

Evidence.

1. Prove that the defendants, together with others, to the number of twelve at least, were "unlawfully, riotously, and tumultuously" assembled together, "to the disturbance of the public peace." It does not seem from these words of the statute, that it is necessary that a riot should have actually been committed; it seems to be sufficient that the assembly was of such a nature, and gathered together under such circumstances, that if they had done the act for the purpose of which they were assembled, it would have been a riot.

2. Prove that silence was commanded, and proclamation made, as stated in the indictment.

3. Prove that the defendants, together with others, to the number of twelve or more "unlawfully, riotously, and tumultuously" remained and continued together for one hour or more after proclamation so made.

4. Prove that the prosecution was commenced within twelve (lunar) months after the offence committed. 1 G. 1. st. 2. c. 5. s. 8.

Indictment for Riotously Beginning to Demolish a House.

*Proceed as in the last precedent, to the *; and then thus:*] And being so unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace, as aforesaid, did then and there feloniously, unlawfully, and with force, begin to demolish and pull down the dwelling house of one J. N., there situate: in contempt of our lord the King and his laws, &c., as in the conclusion of the last precedent.

Felony, death, 1 G. 1. st. 2. c. 5. s. 4. This section extends to churches, chapels, places of worship of dissenters duly certified and registered, dwelling houses, barns, stables, and outhouses. By 52 G. 3. c. 130, the same offence as to buildings, engines, &c., used in manufactories; by 9 G. 3. c. 29. s. 1, as to mills; and by 56 G. 3. c. 125. s. 1, as to engines, bridges, buildings, &c. belonging to collieries, mines, &c. is also made felony, death.

Evidence.

Prove the riotous assembly, as under the last precedent, except that the number of the persons composing it does not seem to be material (see 1 G 1. st. 2. c. 5. s. 4.,) provided they be three at the least. Prove that the assembly began to demolish the house in question, and that it was the dwelling house of J. N., and situate in the parish and county
[337] described *in the indictment. Prove that the defendants were either active in demolishing the house, or present aiding and abetting. And lastly, prove the offence to have been committed within twelve (lunar) months before the commencement of the prosecution. 1 G. st. 2. c. 5. s. 8.

SECT. 2.

AFFRAY.

Indictment for an Affray.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, and J. W. of the same, carpenter, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, being unlawfully assembled together and arrayed in a warlike manner, then and there, in a certain public street and highway there situate, unlawfully, and to the great terror and disturbance of divers liege subjects of our said lord the King then and there being, did make an affray: in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both.

Evidence.

Prove that the defendants fought in a public street or highway; for if it be in private it is an assault and battery merely, and not an affray. 1 Hawk. c. 63. s. 1. Also, no quarrelsome or threatening words whatever will amount to an affray. Id. s. 3.

SECT. 3.

CHALLENGE TO FIGHT.

Indictment for Sending a Challenge.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the *county of [338] M., gentleman, being a person of a turbulent and quarrelsome temper and disposition, and contriving and intending not only to vex, injure, and disquiet one J. N., and to do the said J. N. some grievous bodily harm, but also to provoke, instigate, and excite the said J. N. to break the peace and to fight a duel with and against him the said J. S., on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid *, wickedly, wilfully, and maliciously did write, send, and deliver, and cause and procure to be written, sent, and delivered unto him the said J. N. a certain letter and paper writing containing a challenge to fight a duel with and against him the said J. S., and which said letter and paper writing is as follows, that is to say [here set out the letter, with such inuendos as may be necessary:] to the great damage, scandal, and disgrace of the said J. N., in contempt of our lord the King and his laws, and against the peace of our lord the King, his crown and dignity. (*2d Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., contriving and intending as aforesaid, afterwards, to wit, on the day

and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, wickedly, wilfully, and maliciously did provoke, instigate, excite, and challenge the said J. N. to fight a duel with and against him the said J. S.: to the great damage, scandal, and disgrace of the said J. N., in contempt of our lord the King and his laws, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. See the precedents, Cro. Circ. Com. 102—104. 4 Went. 315. 6 Went. 385. 461. From the above precedent may readily be framed an indictment against the person who delivered the challenge.

Evidence.

Give the letter in evidence, and prove the handwriting. Prove also the delivery of it to J. N. Where the letter containing the challenge was put into the post office in the county of Middlesex, to be delivered to the prosecutor in another county, *Lord Ellenborough* held that the party might be indicted in Middlesex; for *sending* the challenge is the offence; whether it reach the person to whom it is sent or not, is immaterial. R. *v.* Williams, 2 Camp. 506.

Provocation, however great, is no excuse or justification upon the part of the defendant, R. *v.* Rice, 3 East, 581, however it may weigh with the court in apportioning the punishment.

Indictment for Provoking a Man to Send a Challenge.

Proceed as in the last precedent, to the *, and then thus :]

[339] *wickedly, wilfully, and maliciously did utter, pronounce, declare, and say to, and in the presence and hearing of the said J. N., these words following, that is to say; "You are a scoundrel and a liar, and I shall take care to let the world know that you are so;" with intent to instigate, excite, and provoke the said J. N. to challenge him the said J. S. to fight a duel with and against him the said J. N.: to the great damage, &c. as in the last precedent. If there be any doubt as to the words, lay them differently in different counts; and add a general count, not setting out the words, but merely charging the defendant with having used threats and opprobrious language to the prosecutor, with intent, &c.

Fine or imprisonment, or both. See R. *v.* Phillips, 6 East, 464.

Evidence.

Prove the words; see ante, p. 294. And give evidence of circumstances from which the jury may infer the defendant's intent, if such intent do not sufficiently appear from the words proved. See R. *v.* Phillips, 6 East, 470, and ante, p. 65.

Indictment for Challenging to Fight, on account of Money Won at Play.

The same as the precedent, ante, p. 337, *to the end of the statement of the challenge; after which, and immediately before the words* "to the great damage of," &c., *insert these words*, "on account of certain money before that time, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, won by the said J. N. of the said J. S., by then and there gaming, playing, and betting at a certain game of cards called *rouge et noir:* to the great damage, &c. &c. "against the form of the

statute in such case made and provided, and against the peace," &c. &c. *If it be doubtful at what game they played, add a count omitting the name of the game. Add also a count or set of counts in a general form, according to the terms of the statute, thus:* "And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, the said J. N. unlawfully did challenge and provoke to fight with him the said J. S., on account of certain money," &c. &c. as above. Also add counts for a challenge, as in ordinary cases.

Forfeiture of goods and chattels, and two years' imprisonment. 9 Ann. c. 14. s. 8. *The words of the act are "cards, dice, tables, tennis, bowls, or other game or games whatsoever."*

Evidence.

Prove the challenge, as under the last two precedents; and *prove it to have originated from money won at play, as stated [340] in the indictment. See ante, p. 251.

SECT. 4.

THREATENING LETTER.

Indictment for Sending a Letter Demanding Money, &c.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, being an ill designing and disorderly person, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth *, feloniously, knowingly, and unlawfully did send a certain letter in writing, without any name [*or* with a certain fictitious name, *or* with the name of ———] subscribed and signed thereto, directed to one J. N., by the name and description of Mr. J. N., demanding money; and which said letter is as follows, that is to say [here set out the letter verbatim:] against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. The letter must be set out in the indictment; R. *v.* Lloyd, 2 East, P. C. 1123; and care must be taken to set it out correctly, for a variance would be fatal. See ante, p. 64. The venue may be laid in any county, at the option of the prosecutor. See ante, p. 3.

Felony, death. 9 G. 1. c. 22. s. 1. The offence described in the statute is, knowingly sending a letter without any name, or with a fictitious name, subscribed thereto, "demanding money, venison, or other valuable thing.

Evidence.

Give the letter in evidence, and prove it to have been sent by the defendant.

Knowingly did send.] Proof that the defendant dropped the letter in a place where he knew the prosecutor would come, and that it was picked up by another person, and by him delivered to the prosecutor; R. *v.* Lloyd, 2 East, P. C. 1123; or that the letter is of the handwriting of the

defendant, and that it came to the prosecutor by the post; R. *v.* Hemings, 2 East, P. C. 1116, and see R. *v.* Jepson & al. Id. 1115; has been holden sufficient evidence of a sending by the defendant. So, where the prosecutor, having received such a letter, traced it to a woman who
[341] was in the habit of going of errands for the *prisoners in Newgate, and she proved that she received it from the defendant, then a prisoner in Newgate, to put in the post-office, and the servant of the post-office proved that the letter in question was brought to the office by the last witness, and forwarded in the regular course: this was holden sufficient evidence, not only of the sending by the defendant, but that he also knew its contents. R. *v.* Girdwood, 2 East, P. C. 1120. But merely delivering a letter, is not a *sending* of it within the meaning of the act. R. *v.* Hammond, 2 East, 1119.

A letter without a name.] A letter signed with initials merely, (J. S.) is a letter without a name, within the meaning of the act. R. *v.* Robinson, 2 East, P. C. 1110. But a letter signed with the real name of the writer is not within the statute; for the statute expressly extends only to letters without a name, or signed with a fictitious name. And even where a letter without a name was written in an undisguised hand, to a person who well knew the writer's handwriting, and it related to matters then in dispute between them: as it appeared evident from these circumstances that the defendant, although he did not actually sign the letter, had no intention to conceal himself, the judges held that the letter was not within the statute. R. *v.* Hemings, 2 East, P. C. 1116.

A material variance between the letter set out, and that produced in evidence, will be fatal. See ante, p. 64.

Demanding money.] The statute extends to demands of "money, venison, or other valuable thing;" so that if money or venison be not demanded, the thing demanded should be described in the indictment as a certain valuable thing, to wit, — &c. naming it; and if there be a doubt which of two or three things be demanded, it may be stated differently in different counts. Where the letter contained a request only, but intimated that if it were not complied with, the writer would publish a certain libel then in his possession, accusing the prosecutor of murder: this was holden to amount to a demand. R. *v.* Robinson, 2 Leach, 749, 2 East, P. C. 1110. But it is not necessary that the letter should contain a threat; if it appear to *demand* money, &c., in the strict sense of the word, it is sufficient to bring it within the act. A mere request, however, such as asking charity, or the like, without imposing any conditions, would not come within the meaning of the word "demand" in the statute. Per Buller J. in R. *v.* Robinson, supra.

Indictment for Sending a Letter Threatening to Murder, or to Burn Houses, &c.

This may be the same as the last precedent, except that for
[342] the *words "demanding money," you substitute the words "therein threatening to kill and murder the said J. N." or "to burn the dwelling house, outhouses, barns, stacks of corn or grain, hay, or straw" of the said J. N., as the purport of the letter may be.

Felony, death. 27 G. 2. c. 15. See the evidence under the last precedent. Whether the letter amount to a threat to murder, &c., is a fact to be determined by the jury. R. *v.* Girdwood, 2 East, P. C. 1121. But where the writer of the letter threatened to burn the prosecutor's mill, and to do all the injury he was able to his farms; and the

prosecutor proved that he had no mill at the time, but that he had farms, and buildings upon them: the judges held clearly that as to the mill, the letter was not within the statute; and the majority of the judges held that, even as to the farms, as the letter did not necessarily imply that the injury to them was to be effected by fire, it was not within the act. R. *v.* Jepson & al. 2 East, P. C. 1115. See stat. 12 G. 1. c. 34. s. 6, and 22 G. 2. c. 27. s. 12, as to letters threatening to burn or destroy the house, &c. &c. of master manufacturers, unless they comply with the demands of their workmen.

Indictment for Sending a Letter Threatening to Accuse the Party of a Crime.

Commencement, as ante, p. 340, *to the* *] Knowingly and unlawfully did send [*or* deliver to one J. N.] a certain letter in writing [*or* paper writing] without a name [*or* with a certain name, to wit, the name of J. S., *or* with a fictitious name, to wit, the name of J. P.] thereunto subscribed and signed, directed to one J. N. by the name and description of Mr. J. N., threatening to accuse the said J. N. of a certain crime punishable with death [transportation, pillory, or other infamous punishment,] to wit, the crime of murder, [or as the purport of the letter may be,] with a view and intent to extort and gain money [goods, wares, or merchandises] from the said J. N., so thereby and therein threatened as aforesaid; and which said letter is as follows, that is to say [here set out the letter verbatim:] against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Fine and imprisonment, or whipping, or transportation for seven years. 30 G. 2. c. 24. s. 1. And the stat. 52 G. 3. c. 64. s. 1, extends this act to cases where the view or intent is to extort a bond, bill of exchange, bank note, promissory note, or other security for the payment of money, or any warrant or order for the payment of money, or delivery or transfer of goods, or other valuable things.

**Evidence.* [343]

Produce the letter, and prove the sending it, or the delivery of it (knowing its contents,) as stated in the indictment. See ante, p. 340. And prove either directly or from circumstances, that this was done with the view or intent mentioned in the indictment, if it do not sufficiently appear from the letter itself. Where the intent laid was to extort money, and the intent proved was to extort a bill of exchange, it was holden a fatal variance. R. *v.* Major, 2 East, P. C. 1118. In order to prove the intent, other letters received by the prosecutor from the same defendant upon the subject, may be given in evidence. See ante, p. 65. 69.

SECT. 5.

LIBEL.

Indictment for a Libel.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., school-

master, contriving, and unlawfully, wickedly, and maliciously intending to hurt, injure, vilify, and prejudice one J. N., and to deprive him of his good name, fame, credit, and reputation, and to bring him into great contempt, scandal, infamy, and disgrace, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, wickedly, and maliciously did write and publish, and cause and procure to be written and published, a certain false, scandalous, and malicious libel, in the form of a letter, directed to the said J. N., [or if the publication were in any other manner, omit the words, "in the form," &c.] containing divers false, scandalous, and malicious matters and things of and concerning the said J. N., and of and concerning [&c. here insert such of the subjects of the libel, as it may be necessary to refer to by the inuendoes, in setting out the libel; see ante, p. 288, 289,] according to the tenor and effect following; that is to say: [here set out the libel, together with such inuendoes as may be necessary to render it intelligible. See ante, p. 288, 289, 285.] to the great damage, scandal, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both.

[344] *Before we consider the evidence in this case, it may not be unnecessary to notice shortly the law relative to libels against private individuals: we have already noticed seditious libels, (ante, p. 285,) blasphemous libels, (ante, p. 294,) and libels reflecting on the administration of justice, (ante, p. 329.)

A libel, in the sense under which we are now to consider it, is a malicious defamation of any person, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, or ridicule.

In considering what writings are libellous, it may be necessary to premise that wherever an action will lie for a libel, without laying special damage, an indictment will also lie. Also, wherever an action will lie for verbal slander, without laying special damage, an indictment will lie for the same words if reduced to writing and published. But the converse of this latter proposition will not hold good; for an action or indictment may be maintained for words written, for which an action could not be maintained if they were merely spoken. Thorley *v.* Lord Kerry, 4 Taunt. 355. As, for instance, if a man write, or print and publish of another, that he is a scoundrel, (J'Anson *v.* Stuart, 1 T. R. 748,) or villain, (Bell *v.* Stone, 1 B. & P. 331,) it is a libel, and punishable as such; although, if this were merely spoken, it would not be actionable without special damage. 2 H. Bl. 531. But no indictment will lie for mere words, not reduced into writing, 2 Salk. 417. 6 Mod. 125, unless they be seditious (see ante, p. 293,) blasphemous, (ante, p. 294,) grossly immoral, or uttered to a magistrate in the execution of his office, (ante, p. 330,) or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge. See ante, p. 337—339.

1. An action will lie (without laying special damage) for all words spoken of another, which impute to him the commission of some crime punishable by law, such as high treason, murder, or other felony (whether by statute or at common law,) forgery, perjury, subornation of perjury, or other misdemeanor; or even an offence punishable merely by the custom of some particular place, if the words be uttered there. Com. Dig. Action on the case for defamation, D. 1—10. F. 1—7, 12—18, and see 3 Wils. 186. 2 W. Bl. 750. 959. Cowp. 275. 2 Wils. 300. 6 T. R.

694. 9 East, 93. 5 Id. 463. 2 New Rep. 335. 4 Price, 46. 7 Taunt, 431. But words imputing to a man an act, which (however immoral) is not punishable criminally by law, cannot be made the subject of an action. See Com. Dig. *ubi supra*, F. 20. 3 Wils. 187. 2 W. Bl. 750. 5 Bur. 2698. 6 T. R. 691.

2. An action will lie (without laying special damage) for all words spoken of another, which may have the effect of excluding him from society; as, for instance, to charge him with having an infectious disease, such as leprosy, the venereal *disease, the itch, or the [345] like. Com. Dig. Action on the case for defamation, D. 28, 29. F. 11, 19. 2 Bur. 930. But charging him with *having had* a contagious disease, is not actionable; for as this relates to a time past, it is no reason why his society should be avoided at present. 2 T. R. 473.

3. An action will lie (without laying special damage) for writing and publishing any thing of a man, which renders him ridiculous, 2 Wils. 403. 1 W. Bl. 294, or contemptible. Lord Churchill *v.* Hunt, 2 Barn. & Ald. 685.

4. An action will lie (without laying special damage,) for words of a man, which may impair or hurt his trade or livelihood: as, for instance, to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave, or the like. Finch. L. 186. See the several cases in Com. Dig. ubi supra, D. 22—27. F. 9, 10. 2 W. Bl. 750. 3 Wils. 187. 59. 2 Stark. N. P. Rep. 245. 297. 4 Esp. 191. 3 B. & P. 372. 2 Str. 898, Fitzg. 121.

5. Writings vilifying the characters of persons deceased, are libels, and may be made the subject of an indictment; 5 Co. 125 a.; but the indictment in such a case must charge the libel to have been published with a design to bring contempt on the family of the deceased, or to stir up the hatred of the King's subjects against them, or to excite them to a breach of the peace, R. *v.* Topham, 4 T. R. 127, otherwise it cannot be maintained.

6. Writings which tend to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be proceeded upon here as libels, and the writers, publishers, &c. punished; particularly when such writings have a tendency to interrupt the pacific relations between the two countries. Per Lord Ellenborough in R. *v.* Peltier, Holt on Libel, 78, &c. In the case just cited, an information was filed against *Peltier*, for a libel on *Napoleon Buonaparte*, then first consul of the French [illegible]blic; and the defendant was convicted. See also R. *v.* D'Eon, 1 W. Bl. 517.

7. And not only are libels upon individuals punishable by indictment, but writings also reflecting upon bodies of men, without mentioning any one in particular, are likewise punishable as libels, if they tend to stir up the hatred of the King's subjects against the members of the body generally, or to excite the individuals composing the body to a breach of the peace. R. *v.* Osborne, 2 Barnardiston, 138. 166.

Having now treated of the matter of a libel, it remains to say a few words upon the manner or form in which it is expressed. It is immaterial whether the libel impute crime, &c. to the prosecutor, in a direct manner, or indirectly by such hints or modes of expression as are likely to convey the intended meaning to the persons to whom the libel was published; taking the words in the same sense in which the rest of mankind would ordinarily understand them, it is for the *jury to say whe- [346] ther in their minds they convey the idea imputed. 2 T. R. 206, per Buller, J. Therefore where one man said of another that his "character was infamous; that delicacy forbade him from bringing a direct charge,

but it was a male child who complained to him :" such words were understood to mean a charge of unnatural practices, and to be sufficiently certain in themselves, without the aid of an inuendo. Woolnoth *v.* Meadows, 5 East, 463. So, if a man were to write or say of J. N., " there is a vast difference between my character and his ; I never robbed my master," or the like : it would be the same as if he had directly charged J. N. with having robbed his master. See 2 Lev. 150. 1 Vent. 276. Com. Dig. Action on the case for defamation, E. 8. And the same, where the imputation is conveyed obliquely, Id. E. 1, or indirectly, Id. E. 7, or by way of question, Id. E. 2, conjecture, Id. E. 3, or exclamation, Id E. 6, or by irony, 1 Hawk. c. 73. s. 4, or the like. So, a defamatory writing, expressing one or two letters only of a name, is as much a libel, and punishable as such, as if it expressed the name in full, if it appear evident upon the face of the libel, from context, &c., what name was meant, 1 Hawk. c. 73. s. 5, or if it appear from the evidence of persons acquainted with the parties, what person was meant, by such initials or letters.

As to the form of the indictment for libel generally, see ante, p. 287—289.

Evidence.

Prove the offence, in the same manner as directed ante, p. 289—292. If the libel reflect on the character of a public officer or professional man, as such, it is not in general necessary to prove his appointment to the office, or admission to the profession, because that is almost in all cases either directly or impliedly admitted by the libel itself; See 4 T. R. 366. 1 New Rep. 196, 208 ; proof that he was in the habit of acting as such officer or professional man, would in that case be sufficient : but if the effect of the libel be to charge the prosecutor with having acted as such officer or professional man without a legal appointment, as, for instance, if a man libel a physician by calling him a quack, it seems necessary to prove the appointment or admission. See Smith *v.* Taylor, 1 New Rep. 196.

In addition to what has already been mentioned, as to evidence upon the part of the defendant, in cases of libel (ante, p. 292, 293,) the defendant, in the case of a libel against an individual, may prove that the alleged publication of the matter complained of as libellous, was merely a communication in confidence, and without malice : as where a master gives a correct character of a servant, Bul. N. P. 8. 4 Bur. [347] 2425. *1 T. R. 110, where a neighbour gives what he conceives to be a correct character of the credit and solvency of a trades man, Bul. N. P 8, or where a client makes confidential representations injurious to an attorney's professional character, in the management of certain concerns, to other persons who are jointly interested in them with the client, 1 Camp. 227, or the like. Also, if a writing, although injurous to another's character, be published, not maliciously or with intent to injure his character, but *bonâ fide* for the purpose of investigating a fact in which the party making it is interested, it is not libellous. See Delany *v.* Jones, 4 Esp. 191. Brown *v.* Croom, 2 Stark. N. P. C. 297. R. *v.* Bayley, Andr. 229.

The defendant, however, cannot set up the truth of the libel, as a defence to the indictment ; ante, p. 293. 5 Co. 125 b. R. *v.* Burks, 7 T. R. 4. 1 Hawk. c. 73. s. 6 ; nor will he be permitted to allege it even in mitigation of punishment. Ante, p. 293.

Indictment for a Libel upon an Attorney.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. N., gentleman, at the time of publishing the false, scandalous, malicious, and defamatory libel hereinafter mentioned, was, and long before and from thence hitherto hath been, and still is, one of the attornies of the court of our lord the King, before the King himself, and in the office, practice, and business of an attorney, hath been during all that time retained and employed by divers subjects of this realm, to prosecute and defend for them, as their attorney, agent, and solicitor, divers suits and businesses in the said court, and in other his Majesty's courts at Westminster and elsewhere, and also to do and negotiate other affairs and business as such attorney, to wit, at the parish of B., in the county of M.; and the said J. N., during all that time, hath acted in the most fair and honourable manner in the exercise of his said profession, to wit, at the parish aforesaid in the county aforesaid. And that also before the publishing of the said false, scandalous, malicious, and defamatory libel hereinafter mentioned, to wit, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, the said J. N., was, in his business and profession of an attorney, employed and retained by one A. C. to commence and prosecute a certain suit and action at law upon the behalf of the said A. C. against one J. S. for the recovery of a certain sum of money then and long before due and owing to the said A. C. from and by the said J. S., and then remaining unpaid; and the said J. N., in pursuance of the instructions he then and there received from the said A. C. in that behalf, and of his retainer as aforesaid, did *then and [348] there commence and prosecute the said action against the said J. S., as in duty he was bound to do; but the said J. N., in the prosecution of the said action, so far from acting with any unnecessary severity towards the said J. S., on the contrary thereof, then and there acted towards him the said J. S. in as lenient a manner as was consistent with his duty as attorney to the said A. C. as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish aforesaid, in the county aforesaid, grocer, well knowing the premises, but contriving, and wickedly, maliciously, and unlawfully intending to aggrieve and vilify the said J. N., and to injure him in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his clients and neighbours, and other good and worthy subjects of this kingdom, and also to injure the said J. N. in his said business and profession of an attorney, and to cause him to be esteemed and taken to be a negligent and corrupt practiser in his said profession, and to be a person not fit to be intrusted and employed therein, afterwards, to wit, on the tenth day of May, in the year last aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, falsely, wickedly, and maliciously, did write and publish, and cause and procure to be written and published, in the form of a letter directed to the said A. C., a certain false, wicked, malicious, and scandalous libel of and concerning the said J. N., and of and concerning his conduct in his business and profession of attorney, and of and concerning the said action so commenced and prosecuted against the said J. S. by the said J. N. for and as the attorney of the said A. C. as aforesaid, and of and concerning the conduct of the said J. N. as attorney in the said action, according to the tenor and effect following; that is to say [here set out the libel, with such inuendoes as may be necessary; see ante, p. 288, 289:] to the great scandal,

infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

As to the evidence, see ante, p. 346, 289—292.

Indictment for Hanging a Man in Effigy.

Commencement, as ante, p. 343.] In the county aforesaid, falsely, wickedly, and maliciously did make, and cause and procure to be made, a certain gibbet and gallows, and also a certain effigy or figure intended to represent the said J. N.; and then and there unlawfully, wickedly, and maliciously did erect, set up, and fix, and cause and procure to be erected, set up, and fixed, the said gibbet and gallows, in a certain yard and place near unto a certain common highway there situate, called ———, and near to a certain ferry called The Horse Ferry,

[349] *where the said J. N. was used and accustomed to ply in the way of his trade and business of a waterman; and then and there unlawfully, wickedly, and maliciously did hang up and suspend, and cause and procure to be hung up and suspended, the said effigy and figure to and upon the said gibbet and gallows, with the name of the said J. N. inscribed on a piece of wood affixed to the said effigy and figure, together with divers scandalous inscriptions and devices affixed upon and about the same, reflecting on the character of the said J. N.; and did then and there keep and continue, and cause and procure to be kept and continued, the said gibbet and gallows so erected and set up as aforesaid, with the said effigy and figure hung up and suspended to and from the same, as aforesaid, together with the several inscriptions and devices aforesaid, so affixed as aforesaid, for a long space of time, to wit, for the space of four days then next following, and during all that time unlawfully, wickedly, and maliciously, did then and there publish and expose the said gibbet and gallows, with the said effigy and figure thereon, to the sight and view of divers good and worthy subjects of our said lord the King, passing and repassing in and along the highway aforesaid: to the great scandal, infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Evidence.

Prove the hanging in effigy, as described in the indictment; and prove that the figure was intended to represent the prosecutor. Give also, if necessary, evidence of circumstances, from which the jury may presume malice upon the part of the defendant. See ante, p. 290. 65.

*CHAPTER IV.

Offences Against Public Trade.

SECT. 1. *Smuggling.*
2. *Forestalling, Regrating, Engrossing.*
3. *Seducing Artists to Leave the Kingdom.*

SECT. 1.

SMUGGLING.

Indictment for being Armed and Assembled for the Purpose of Assisting in Running Uncustomed Goods, &c.

Kent, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of K., labourer, J. W. late of the same, mariner, and E. W. late of the same, labourer, together with divers other evil disposed persons to the jurors aforesaid unknown, to the number of three or more, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, within Great Britain, to wit, at the parish aforesaid, in the county aforesaid, being armed with fire arms, and other offensive weapons, to wit, with guns, pistols, swords, and daggers, then and there feloniously and unlawfully were assembled and gathered together, in order to be aiding and assisting * in the illegal running, landing, and carrying away of certain uncustomed goods [*or certain* prohibited goods, *or* certain goods liable to pay certain duties, and which said duties were not then paid or secured:] against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 52 G. 3. c. 143. s. 11. The venue may be laid in any county. Id. Indictments for being armed and assembled in order to be aiding and assisting in doing other acts mentioned in the statute, may readily be framed from the above precedent, by stating such act immediately after the above *.

Evidence.

Prove that the defendants, or some of them, together with *other persons unknown, to the number of three at least, were [351] assembled and armed as stated in the indictment. A variance between the indictment and evidence as to the kind of arms with which they were armed, does not seem to be material; if it be proved that the defendants were armed either with "fire arms," or such other "offensive weapons" as are within the meaning of the act, it should seem to be sufficient. And in R. v. Cosans, 1 Leach, 342, 343 n., the court held that not only guns, pistols, daggers, and other instruments of war, but also bludgeons, (properly so called,) clubs, and such other things as are

not in common use for any other purpose but as weapons, are within the meaning of the act. See R. *v.* Hutchinson, 1 Leach, 342. A common whip, however, has been holden not to be an offensive weapon within the act. R. *v.* Fletcher, 1 Leach, 23. Also, if in the heat of an affray, a man catch up a hatchet accidentally, this is not within the meaning of the statute. R. *v.* Rose, 1 Leach, 342 n. Also, to bring the case within the statute, it must appear that the parties had deliberately assembled, for the purpose charged in the indictment.

The purpose for which the defendants assembled, is proved, either expressly, by the evidence of an accomplice or the like; or impliedly, by evidence of circumstances from which the jury may fairly presume it.

Indictment for Assisting in the Running of Uncustomed Goods.

The same as in the last precedent, except that instead of the words "were assembled and gathered together in order to be aiding and assisting," *you insert these words* "were aiding and assisting, and then and there feloniously and unlawfully did aid and assist" *in, &c.*

Felony, death. 52 G. 3. c. 143. s. 11. See the last precedent. See stat. 8 G. 1. c. 18. s. 6. 9 G. 2. c. 35. s. 13. 19 G. 3. c. 69. s. 9. 12.

Evidence.

Prove that the defendants, or the defendants and others, to the number of three at least, armed as mentioned in the evidence under the last precedent, were aiding and assisting in doing that which is charged against them by the indictment, as, for instance, in running or landing uncustomed goods, &c. Reasonable proof must be given of the goods being uncustomed; that is, evidence must be given of some facts or circumstances from which the jury may fairly presume it. See R. *v.* Shelley, 1 Leach, 340 n. and see 12 G. 1. c. 28. s. 8.

Indictment for Shooting at a Ship belonging to his Majesty's Navy.

Kent, to wit: The jurors for our lord the King upon their
[352] *oath present, that J. S., late of the parish of B., in the county of K., mariner, being an evil disposed person, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, feloniously and maliciously did shoot at and upon a certain ship and vessel [*or* boat] belonging to his said Majesty's navy, [*or* in the service of the customs *or* excise,] called the ———, the said ship and vessel being then within the limits of a certain harbour [*port or creek*] of Great Britain, called ———, to wit, at the parish aforesaid, in the county aforesaid: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Felony, death. 52 G. 3. c. 143. s. 11. The venue may be laid in any county. Id. and see 48 G. 3. c. 84. s. 8. The statute also expressly extends to this offence if committed on the high seas within 100 miles from the coast of Great Britain or Ireland. An indictment on the same section of the statute, for shooting at, maiming, or dangerously wounding an officer of the army or navy, or any person acting in his aid, whilst in the execution of his duty under any act relating to the customs or excise, may readily be framed from the above precedent.

Evidence.

Prove that the defendant shot at the ship or vessel, &c. mentioned in the indictment; the malice will be presumed, until the contrary be shewn upon the part of the defendant. Prove also that the vessel in question belonged at the time to his Majesty's navy, or was in the service of the customs or excise, as stated in the indictment; which may be done, it should seem, by parol testimony, without any documentary evidence. And prove that the vessel, at the time, was within the limits of the harbour mentioned in the indictment.

Indictment for Lighting a Fire on the Coast, as a Signal to a Smuggling Vessel.

Kent, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, being an evil disposed person, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, between the hours of nine and ten in the evening of the same day, within six miles of a certain part of the coast and shores of Great Britain, to wit, at the parish aforesaid, in the county aforesaid, did unlawfully make and aid and assist in making, and was then and there unlawfully present for the purpose of aiding and assisting in making, a certain light, fire, flash and blaze, for the purpose of making and giving a signal to some person and persons to the jurors *aforesaid unknown, on board a certain [353] smuggling ship and vessel [*or* boat] there being, to wit, at the parish aforesaid, in the county aforesaid: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Fine 100*l.*, *or imprisonment and hard labour for a term not exceeding a year.* 4 G. 3. sess. 2. c. 66. s. 34. The quarter sessions have cognizance of the offence. R. *v.* Cock, 4 M. & S. 71.

Evidence.

All the prosecutor has to prove, is, that the defendant lighted the fire, or was present aiding and assisting in doing so, in some part of the county, within six miles of the coast. It is not necesseary for him to prove that any smuggling vessel was in fact within sight, or hovering off the coast, at the time; and it is for the defendant to prove (if he can) that the fire, &c. was not lighted with the intent charged in the indictment. 47 G. 3. sess. 2. c. 66. s. 34.

SECT. 2.

FORESTALLING, REGRATING, ENGROSSING.

Indictment for Forestalling.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, unlawfully did buy, and cause to be bought of and from one J. N., three

hundred pounds weight of cheese, for the sum of three pounds ten shillings, as he the said J. N. then and there was coming towards London, to wit, to a certain market called Leadenhall Market, in London aforesaid, to sell the said cheese, and before the same was brought into the said market where the same should be sold: in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. This offence is described by stat. 5 & 6 Ed. 6. c. 14, to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there.

[354] **Evidence.*

Prove the purchase of the cheese, as stated in the indictment; the quantity is immaterial. And prove that it was purchased on the way to the market, and before it arrived there.

Indictment for Regrating.

Commencement, as in the last precedent.] In the county aforesaid, in a certain market there called ———, did buy, obtain, and get into his hands and possession ten geese, thirty ducks, and eighteen drakes, of and from one J. N., for the sum of four pounds and nine shillings, (the said geese, ducks, and drakes, then being brought to the said market by the said J. N. to be sold;) and afterwards, to wit, on the day and year aforesaid, he the said J. S., at the parish aforesaid, in the county aforesaid, in the said market there [*or* in a certain other market called ———, situate within four miles of the market aforesaid, to wit, in the parish of ——, in the county aforesaid,] unlawfully did regrate the said geese, ducks, and drakes, and sell the same again to one A. C. for the sum of five pounds: in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. This offence is described by stat. 5 & 6 Ed. 6. c. 14, to be the buying of corn or other victual in any market, and selling it again in the same market, or in any other market within four miles thereof.

Evidence.

Prove the purchase and resale, as stated in the indictment. A variance between the indictment and evidence in the number of geese, &c. or the price at which they were bought or resold, does not seem to be material. Nor does it appear to be necessary, to constitute the offence, that the defendant should have derived profit from the resale.

Indictment for Engrossing.

Commencement, as ante, p. 353.] In the county aforesaid, unlawfully did engross and get into his hands, by buying of and from one J. N., fifty quarters of wheat, to the intent to sell the same again for lucre, gain, and

profits in contempt of our said lord the King and his laws, to the evil example of all *others in the like case offending, and [355] against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. This offence is described by stat. 5 & 6 Ed. 6. c. 14, to be the getting into one's possession, or buying up of corn or other dead victual, with intent to sell it again.

Evidence.

Prove the purchase; and prove the intent, either by the defendant's admission, or by proof of his having actually resold the corn, or by proof of some other circumstances from which the jury may presume it.

SECT. 3.

ENTICING ARTIFICERS TO LEAVE THE KINGDOM.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., late of the parish of B. in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, unlawfully did contract with and entice, and endeavour to persuade, solicit, and seduce one J. N., a manufacturer, workman, and artificer of and in iron, steel, and brass, then and there being, to go out of this kingdom into a certain foreign country called France, and which said foreign country was not then within the dominion of, or belonging to the crown of Great Britain: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

500l. fine and a year's imprisonment, for the first offence; and 1000l. fine and two year's imprisonment for the second. 23 G. 2. c. 13. s. 1. The words in the statute are "any manufacturer, workman, or artificer of or in wool, mohair, cotton, or silk; or of or in any manufactures made up of wool, mohair, cotton, or silk; or any of the said materials mixed one with another; or of or in iron, steel, brass, or any other metal; or any clockmaker or watchmaker, or any other manufacturer, workman, or artificer of or in any other of the manufactures of Great Britain or Ireland, of what nature or kind soever." See 22 G. 3. c. 60. s. 1, as to persons employed in the printing of calicoes, &c. or in making blocks, tools, &c.: 25 G. 3. c. 67. s. 6, as to persons employed in making tools or utensils for the iron *or steel manufactures; and 39 G. 3. c. 56. s. 8, as [356] to persons engaged in collieries.

Evidence.

Prove that the defendant contracted with, or endeavoured to entice or seduce J. N. to go to France; and prove that J. N. is a manufacturer or workman, &c. as described in the indictment. Prove also that the prosecution was commenced within twelve months after the offence commited. 23 G. 2. c. 13. s. 2.

*CHAPTER V.

Offences against Public Police and Economy.

SECT. 1. *Bigamy.*
2. *Common Nuisance.*
3. *Open and Notorious Lewdness.*
4. *Gaming.*
5. *Offences relating to Game.*
6. *Taking up Dead Bodies.*
7. *Disturbing Public Worship.*
8. *Refusing to Execute a Public Office.*

SECT. 1.

BIGAMY.

Indictment for Bigamy.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the first day of April, in the first year of the reign of our sovereign lord George the Fourth, at the parish of C., in the county of D., did marry one A. C., spinster, and her the said A. then and there had for his wife; and that the said J. S. afterwards, and whilst he was so married to the said A. as aforesaid, to wit, on the third day of May, in the third year of the reign aforesaid, at the parish of F., in the county of G., feloniously and unlawfully did marry and take to wife one M. Y., and to her the said M. was then and there married, the said A. his former wife being then alive: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the first day of August, in the
[358] year last aforesaid, at the said parish *of B., in the county of M. aforesaid, was apprehended and taken for the felony aforesaid.

Felony, 1 J. 1. c. 11. s. 1, *punishable as grand or petit larceny*. 35 G. 3. c. 67. s. 1. The venue may be laid in the county where the defendant was apprehended, in the same manner as if the offence were committed in that county; 1 J. 1. c. 11. s. 1; or it may be laid in the county in which the offence (that is, the second marriage) was committed. 1 Hale, 694. Hence, when the venue is laid in the county where the defendant was apprehended, no advantage can be had of some or all the facts (with the exception of the defendant's apprehension) being laid in a foreign county.

Evidence on the part of the prosecution.

1. The marriage between the defendant and A. C., must be proved. The time at which it was celebrated, is immaterial; and whether celebrated in this country or in a foreign country is also immaterial. 1 Hale, 692.

If celebrated abroad, it may be proved by any person who was present at it; and such circumstances should also be proved, from which the jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated. Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rights and custom of the foreign country, would be sufficient presumptive evidence of it, see R. *v.* Inhabitants of Brampton, 10 East, 282, so as to throw upon the defendant the onus of impugning its validity.

If celebrated in this country, it may be proved by the production of the register of the marriage, or an examined copy of it, together with some proof, either direct or presumptive, of the identity of the parties; ante, p. 87; and if the marriage were by license, and it appear that either of the parties were a minor at the time, the prosecutor must further prove that the marriage was solemnized with the consent of the father, guardian, or mother of the minor, according to stat. 26 G. 2. c. 33. s. 11. R. *v.* Bridgewater and R. *v.* Butler, 1 Russel, 294. Per Bayley, J. in Smith *v.* Huson, 1 Phillimore, 287. Or, the marriage may be proved by some person who was present at it: but then, it should seem, evidence must be given of banns regularly published, or of a license; and, if the marriage were by license, that the parties were of age; or (if under age) that the marriage was had with the consent of the father of the minor, or of the guardian if the father were dead, or of the mother if there were no guardian, or of a guardian appointed by the court of chancery if the mother were dead. In fact a valid marriage must be proved; Per Bayley, J. in Smith *v.* Huson, 1 Phillimore, 287; the law will not presume it in cases *of bigamy, as it will in several cases. Id. [359] See 26 G. 2. c. 33. It may be necessary to add, that the marriages of Jews and quakers, where both parties are Jews or quakers, are excepted out of this marriage act; nor does it extend to marriages beyond seas, or in Scotland. Id. s. 18. See as to Scotch marriages, Ilderton *v.* Ilderton, 2 H. Bl. 145. Crompton *v.* Bearcroft, Bul. N. P. 113, and see as to marriages of illegitimate children by license, in England, Priestley *v.* Hughes, 11 East, 1.

Proof, however, of a marriage which is voidable merely, as for consanguinity, or the like, will support an indictment for bigamy. 3 Inst. 88. But it is otherwise, if the marriage be not voidable merely, but void: as, for instance, if a woman marry A., and, in the lifetime of A., marry B.; and after the death of A., and whilst B. is alive, she marry C.: she cannot be indicted for bigamy in her marriage with C., because her marriage with B. was a mere nullity. 1 Hale, 693. So the marriage of an ideot, or of a lunatic not in a lucid interval, is void, because he is deemed in law incapable of entering into such a contract. 1 Bl. Com. 438, 439, So, if a boy under 14, or a girl under 12, contract matrimony, it is void, unless both husband and wife consent to and confirm the marriage, after the minor arrives at the age of consent. Co. Lit. 79. Vide post.

2. The prosecutor must prove the defendant's subsequent marriage with M. Y. And this must be proved to have taken place in England; for it is the second marriage which constitutes the offence. 1 Hale, 692,

693. This marriage is proved in the same manner as directed ante, p. 358.

3. It must be proved that the first wife was alive at the time the second marriage was solemnized; which may be done by some person acquainted with her, and who saw her at the time or afterwards.

And it may be necessary to observe, that the first wife is not a competent witness to prove any part of the case, either for or against her husband, ante, p. 97, but the second wife is. Ante, p. 98.

Evidence for the defendant.

The following are good defences to an indictment for bigamy:

1. That the wife or husband of the party indicted has been "continually remaining beyond the seas, by the space of seven years together;" 1 J. 1. c. 11. s. 2; even although the party indicted knew the other to be alive. 1 Hale, 693.

2. That the wife or husband of the party indicted had "absented him or herself" from the party indicted, "by the space of seven [360] years together, in any parts within his Majesty's *dominions (that is, within England, Wales, or Scotland, 1 Hale. 693,) the one of them not knowing the other to be living within that time." 1 J. 1. c. 11. s. 2.

3. That before the second marriage, the party indicted was divorced from the former wife or husband, by a sentence of the ecclesiastical court. 1 J. 1. c. 11. s. 3. And whether the divorce be *à mensâ et thoro*, or *à vinculo matrimonii*, is immaterial. 1 Hale, 694. 1 Hawk. c. 42. s. 5. March. 101. Kel. 27. But a divorce in a court in Scotland, of persons married in England, does not seem to be within this clause of the act. R. *v.* Lolly, 1 Russel, 237.

4. That the former marriage was declared to be void and of no effect, by sentence in an ecclesiastical court. 1 J. 1. c. 11. s. 3. This, however, does not extend to the sentence of an ecclesiastical court in a cause of jactitation; Duchess of Kingston's case, 11 St. Tr. 260. and see ante, p. 84; and even sentences within this clause of the act, may be impeached upon the part of the crown upon the ground of fraud or collusion. Id. 1 Ph. Ev. 338.

5. That at the time of the former marriage, either the party indicted, or the other was within the age of consent; 1 J. 1. c. 11. s. 3. 1 Hale, 694. 3 Inst. 89; that is to say, within the age of 14 in a man, or 12 in a woman.

Sect. 2.

COMMON NUISANCE.

Indictment for Carrying on an Offensive Trade.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., [labourer,] on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, near unto divers public streets being the King's common highways, and also near unto the dwelling houses of di-

vers liege subjects of our said lord the King there situate and being, unlawfully and injuriously did [make, erect, and set up, and did cause and procure to be made, erected, and set up, a certain furnace and boiler, for the purpose of boiling tripe and other entrails and offal of beasts; and that the said J. S., on the day and year aforesaid, and on divers other days * and times, between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did boil, and cause and procure to be boiled, in *the [361] said boiler divers large quantities of tripe and other entrails and offal of beasts;] by reason of which said premises, divers noisome, offensive, and unwholesome smokes, smells, and stenches, during the time aforesaid, were from thence emitted and issued, so that the air then and there was and yet is greatly filled and impregnated with the said smokes, smells, and stenches, and was and is rendered and become and was and is corrupted, offensive, uncomfortable, and unwholesome: to the great damage and common nuisance of all the liege subjects of our said lord the King there inhabiting, being, and residing, and going, returning, and passing through the said streets and highways, and against the peace of our lord the King, his crown and dignity. (*2d count, for continuing the nuisance.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., on the said third day of May, in the year aforesaid and from that day until the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, [a certain other furnace and boiler, for the purpose of boiling tripe and other entrails, and offal of beasts, before that time made, erected, and set up, by certain persons to the jurors aforesaid unknown, unlawfully and injuriously did continue, and yet doth continue; and that the said J. S., on the said third day of May, in the year last aforesaid, and on divers other days [&c. as in the first count, from the * to the end. See the following precedents: for using a shop in a public market or a slaughter house, C. C. C. 301, and see 4 Went. 224:—for erecting a manufactory for hartshorn, C. C. C. 311:—for erecting a privy near the highway, 4 Went. 225;:—for placing putrid carrion near the highway, 4 Went. 213:—for keeping hogs near a public street, and feeding them with offal, C. C. C. 305; and see 2 L. Raym. 1163:—for keeping a fierce and unruly bull in a field through which there was a foot way, C. C. C. 310:—for keeping a ferocious dog unmuzzled, C. C. C. 311:—for baiting a bull in the King's highway. 4 Went. 213.

Fine or imprisonment, or both; and the nuisance to be abated, if alleged and proved to be then continuing. See 8 T. R. 143. 7 T. R. 467. 13 East, 164.

Evidence.

Prove that the defendant erected the boiler in question, or that he continued it after being erected by some other person; prove that he used it for the purposes alleged in the indictment; prove that the smoke or smell arising from it, was either injurious to health, or so offensive as to detract considerably from the enjoyment of life and property in its neighbourhood; see R. *v.* White & al., 1 Bur. 333; and prove that it is in a populous neighbourhood, for its being a nuisance depends in a great *measure upon the number of houses, and the concourse [362] of people in its vicinity, and which is a matter of fact to be judged of by the jury. Id.

The defendant, on the other hand, it seems, may prove that the boiler was erected in a neighbourhood where there were already established

other trades, &c. emitting smells extremely offensive or insalubrious, and which smells were not perceptibly increased by the alleged nuisance in question. R. *v.* Neville, Peake, 91. But it is no defence to say that the alleged nuisance has existed for a number of years; for no length of time will legalize a nuisance. R. *v.* Cross, 3 Camp. 227: and see 7 East, 199.

Indictment for Keeping a Bawdy-House.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B. in the county of M., labourer, and A. his wife, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully did keep and maintain a certain common ill-governed and disorderly house; and in the said house, for the lucre and gain of him the said J. S., certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and on the said other days and times, there, unlawfully and willingly did cause and procure to frequent and come together; and the said men and women, in the said house of him the said J. S., at unlawful times, as well in the night as in the day, then and on the said other days and times, there, to be and remain, drinking, tippling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet do permit: to the great damage and common nuisance of all the liege subjects of our said lord the King there inhabiting, being, residing, and passing, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. See ante, p. 361. A married woman may be indicted with her husband, for this offence. R. *v.* Williams, 1 Salk. 383. The indictment shall not be removed by certiorari, 25 G. 2. c. 36. s. 10, unless upon the part of the crown; R. *v.* Davies, 5 T. R. 626; and it shall be determined at the same sessions or assizes at which it is preferred, unless the court, upon cause shewn, think proper to adjourn the same. 25 G. 2. c. 36. s. 10.

Evidence.

Prove that the house in question, or a room or rooms in it, [363] *were let out for the purposes mentioned in the indictment.

And if a lodger let her apartment for the purpose of indiscriminate prostitution, it is as much a bawdy-house as if she held the whole house. R. *v.* Pierson, 2 L. Raym. 1197; 1 Salk. 382.

Secondly, prove that the defendants "acted or behaved as master or mistress, or as the persons having the care, government, or management" of the house in question; which is sufficient evidence that the defendants kept the house. 25 G. 2. c. 36. s. 8.

And, thirdly, prove the house to be situate in the parish mentioned in the indictment; for this being matter of local description, it must be proved as laid, otherwise the defendant must be acquitted. See ante, p. 62.

Indictment for Keeping a Common Gaming House.

Commencement as in the last precedent.] In the county aforesaid, unlawfully did keep and maintain a certain common gaming house; and in the said common gaming house, for lucre and gain, on the said third day of May in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did cause and procure divers idle and evil disposed persons to frequent and come, to play together at a certain unlawful game at cards called *Rouge et noir;* and in the said common gaming house, on the said third day of May, in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did permit and suffer the said idle and evil disposed persons to be and remain, playing and gaming at the said unlawful game called *Rouge et noir*, for divers large and excessive sums of money: to the great damage and common nuisance of all the liege subjects of our said lord the King, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. (2 *Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the said third day of May, in the year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully did keep and maintain a certain common gaming room in the house of one J. N. there situate; and in the said common gaming room, &c. &c. as in the last count, only substituting 'gaming room' for 'gaming house.'

Fine and imprisonment, or both. The indictment shall not be removed by certiorari, 25 G. 2. c. 36. s. 10, unless upon the part of the crown; R. *v.* Davies, 5. T. R. 626; and it shall be determined at the same sessions or assizes at which it is preferred, unless the court, upon cause shewn, think proper to adjourn the same. 25 G. 2. c. 36. s. 10.

**Evidence.* [364]

Prove that the house in question, or a room or rooms in it, were used for the purpose mentioned in the indictment. See 5 T. R. 338. Prove that the defendant "acted or behaved as master or mistress, or as the person having the care, government, or management" of the house or room in question; which is sufficient evidence that the house or room was kept by the defendant. 25 G. 2. c. 36. s. 8. And lastly, prove the house to be situate within the parish mentioned in the indictment. See ante, p. 363. 62.

Indictment for Obstructing a Common Highway.

Commencement, as ante, p. 360.] In the county aforesaid, in a certain street there called Lemon Street, being the King's common highway (used for all the liege subjects of our lord the King, with their horses, coaches, carts, and carriages, to go, return, pass, repass, ride, and labour, at their free will and pleasure,) unlawfully and injuriously did [put and place three empty drays, and did then and on the said other days and times there unlawfully and injuriously permit and suffer the said empty drays respectively to be and remain in and upon the King's common highway aforesaid, for the space of several hours, to wit, for the space of five hours on each of the said days;] whereby the King's common highway aforesaid, then and on the said other days and times, for and during all the time aforesaid,

on each of the said days respectively, was obstructed and straitened, so that the liege subjects of our said lord the King could not then and on the said other days and times go, return, pass, repass, ride, and labour with their horses, coaches, carts, and other carriages, in, through, and along the King's common highway aforesaid, as they ought and were wont and accustomed to do: to the great damage and common nuisance of all his Majesty's liege subjects, going, returning, passing, repassing, riding, and labouring in, through, and along the King's common highway aforesaid, to to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

See precedents of obstructing a highway, by continuing a hedge across it, C. C. C. 307:—by erecting a gate across it, 6 Went. 401, 405:—by building or continuing a building upon it, 4 Went. 191. 181:—by placing carts upon it for the sale of vegetables, C. C. C. 305:—by laying soil upon it, C. C. C. 303:—by laying rubbish upon it, C. C. C. 316:—by digging holes in it, C. C. C. 303. 314:—by digging a horse-pond and erecting a cistern in it, C. C. C. 304:—by stopping a water-course and thereby overflowing the highway, C. C. C. 306.

[365] **Fine or imprisonment, or both.* Nuisance, as far as it relates to highways, is of two kinds: positive, by obstruction; and negative, by want of reparations. The latter we shall consider presently.

Evidence.

Prove the obstruction, as stated in the indictment; and prove that it was productive of inconvenience to persons passing through the street, either in carriages or on foot. Where a wagoner occupied one side of a public street in a city before his warehouses, in loading and unloading his wagons, for several hours at a time, both day and night, and having one wagon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying upon the ground ready for loading: this was holden to be a public nuisance, although it appeared that there was room for two carriages to pass on the opposite side of the street. R. *v.* Russell, 6 East, 427.

Indictment for Obstructing the Navigation of a Public River.

Gloucestershire, to wit: The jurors for our lord the King upon their oath present, that the river *Severn*, that is to say, a certain part of the said river lying and being in the county of Gloucester, is, and from the time whereof the memory of man is not to the contrary hath been, an ancient river and the King's ancient and common highway for all the liege subjects of our lord the King and his predecessors, with their ships, barges, lighters, boats, wherries, and other vessels, to navigate, sail, row, pass, repass, and labour, at their will and pleasure, without any impediment or obstruction whatsoever. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., late of the parish of B., in the county aforesaid, fisherman, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, and injuriously did [erect, fix, put, place, and set in the said river and King's ancient and common highway there, near a certain place called *Guy's Shard*, a certain snare, trap,

machine, and engine, commonly called Putts, for the taking and catching of fish, and composed of wood, wooden stakes, and twigs; and that he the said J. S., on the said third day of May, in the year last aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, in the said river and King's ancient and common highway there, *the said snare, trap, machine, and engine, [366] called Putts, unlawfully, wilfully, and injuriously did continue, and still doth continue, so erected, fixed, put, placed, and set in the said river and King's ancient and common highway as aforesaid;] by means whereof the navigation and free passage of, in, through, along, and upon the said river *Severn*, and King's ancient and common highway, on the day and year aforesaid, and on the said other days and times, hath been, and still is, greatly straitened, obstructed, and confined, to wit, at the parish aforesaid, in the county aforesaid, so that the liege subjects of our said lord the King, navigating, sailing, rowing, passing, repassing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river and King's ancient and common highway there, on the same day and year aforesaid, and on the said other days and times, could not, nor yet can, go, navigate, sail, row, pass, repass, and labour with their ships, barges, lighters, boats, wherries, and other vessels, upon and about their lawful and necessary affairs and occasions, in, through, along, and upon the said river and King's ancient and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do: to the great damage and common nuisance of all the liege subjects of our said lord the King, navigating, sailing, rowing, passing, repassing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river *Severn*, and King's ancient and common highway there, to the great obstruction of the trade and navigation of and upon the said river, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. Also, to divert a part of a public river, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burthen as it could before, is a common nuisance. 1 Hawk. c. 75. s. 11. But if a ship or other vessel sink by accident in a river, although it obstruct the navigation, yet the owner is not indictable as for a nuisance, for not removing it. R. *v.* Watts, 2 Esp. 675.

Evidence.

Prove that the river in question is public and navigable, in that part of it which was obstructed; and prove the obstruction stated in the indictment, in the same manner as under the last precedent.

Indictment against a Parish for Not Repairing a Highway.

Middlesex, to wit: The jurors for our lord the King upon *their oath present, that from the time whereof the memory of [367] man is not to the contrary, there was and yet is a certain common and ancient King's highway, leading from the town of Hatfield, in the county of Hertford, towards and unto the city of London, used by and for all the liege subjects of our said lord the King and his predecessors, with their horses, coaches, carts, and other carriages, to go, return, pass,

repass, ride, and labour, at their free will and pleasure; and that a certain part of the said common and ancient King's highway, called ——— lane, situate, lying, and being in the parish of Fryern Barnet, in the county of Middlesex, extending from a certain field there called ———, unto a certain bridge called ——— bridge, containing in length forty yards and in breadth eight yards, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, and continually afterwards, until the day of the taking of this inquisition, at the parish aforesaid, in the county last aforesaid, was and yet is, very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same; so that the liege subjects of our said lord the King, during the time last aforesaid, could not go, return, pass, repass, ride, and labour with their horses, coaches, carts, and other carriages, in, through, and along the King's common highway aforesaid, as they ought and were wont and accustomed to do, without great danger of their lives, and the loss of their goods: to the great damage and common nuisance of all his Majesty's liege subjects, going, returning, passing, repassing, riding, and labouring in, through, and along the King's common highway aforesaid: to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity *. And that the inhabitants of the said parish of Fryern Barnet, in the said county of Middlesex, the common highway aforesaid, so as aforesaid being in decay, ought to repair and amend, when and so often as it should or shall be necessary. If there be other parts of the highway out of repair, within the same parish, insert other counts specifying them. An indictment against a parish for not repairing a horse and footway, is the same as the above, only substituting for the word "highway," the words "pack and prime way;" and for the words "with their horses, coaches, carts," &c. in the commencement, substituting the words "on horseback and on foot, to go, return, pass, repass, ride, labour, and drive their cattle at their free will and pleasure;" and for the words "with their horses, coaches, carts, and other carriages," near the end of the count, substituting the words "with their horses and cattle." The indictment usually states the highway, to have been so immemorially: but this is unnecessary; it is sufficient to allege that it is a common public highway, without shewing how it became so; Aspindall *v.* Brown, 3 T.
[368] R. 265; and it is prudent to plead it thus, *particularly where it is not an ancient way. So, although usual, it is said to be unnecessary, to shew the *termini* of the way; 2 Saund. 158 c. R. *v.* Haddock, Andr. 145; yet, perhaps, it is safer to do so. 1 Hawk. c. 76. s. 86, 87. But if stated, they must be stated correctly; for a variance between the indictment and evidence in this respect would be fatal. R. *v.* Great Canfield, 6 Esp. 136. The indictment, however, must shew with certainty the part of the road which is out of repair, how many yards in length, how many feet in breadth, &c. 1 Hawk. c. 76. s. 88, 89; but see 2 Saund. 158 d., and that it is within the parish; See Cowp. 111. 3 T. R. 509; and if the parish be situate, part in one county and part in another, the indictment must be against the whole parish, although the road out of repair were in a part of the parish lying in one county only; R *v.* Inhabitants of Clifton, 5 T. R. 498. See 4 Bur. 2507, cont.; but the venue must nevertheless be laid in the county where that part of the road out of repair was situate.

Fine. As to the levying and application of such fine, see 13 G. 3. c. 78. s. 47. 12 East, 366; and as to costs, see Id. s. 64. The indictment shall not be removed by certiorari, (except at the instance of the pro-

secutor, Cowp. 78, unless the obligation to repair come in question. Id. s. 24.

General Issue.

And J. S. and J. N., two of the inhabitants of the said parish of Fryern Barnet, by A. B. their attorney, for themselves and the rest of the inhabitants of the said parish, come into court here, and having heard the said indictment read, say, that they are not guilty of the said premises in the said indictment above specified and charged upon them; and of this they put themselves upon the country, &c. See ante, p. 49.

Evidence for the prosecution, under the general issue.

1. The prosecutor must prove that the road or street in question is a public highway, that is to say, a way open and common to all persons. 1 Hawk. c. 76. s. 1. See 8 T. R. 634. 11 East, 376 n. 5 Taunt 125. 1 Camp. 260. 4 Camp. 16. And if the *termini* be set out in the indictment, they must be proved as laid. R. *v.* Great Canfield, 6 Esp. 136.

2. He must prove that the part of the road in question, out of repair, is within the parish charged in the indictment; and any local description given of the part out of repair, must be proved as laid. See ante, p. 62. But want of certainty in such description cannot be taken advantage of under the general issue. R. *v.* Hammersmith, 1 Stark. 357.

3. He must prove the part of the road so described, to be out of repair, as stated in the indictment. See 2 L. Raym. 1169.

*4. It is not necessary, however, to prove the liability of the [369] parish to repair; for the law presumes that, until the contrary is shewn.

5. It may be necessary to observe, that the surveyor of the parish is a competent witness for the prosecution, 13 G. 3. c. 78. s. 69, and also for the defendants. So, an inhabitant of the parish (even, it seems, the prosecutor himself, see 1 Stark. 357,) is a competent witness for the prosecution, see 13 G. 3. c. 78. s. 76, though not so for the defendants. 1 Barn. & Ald. 66. 15 East, 474.

Evidence for the parish, under the general issue.

Under the general issue, the parish may prove that the road in question is not a common highway, or that it is in good and sufficient repair, or that the part out of repair is not within the parish. 2 Saund. 158 b in notis. R. *v.* Inhabitants of Norwich, 1 Str. 181, 182, 183. But they cannot prove the liability of particular persons, *ratione tenuræ*, or the like, to repair the road in question; that defence must be made the subject of a special plea, in all cases, R. *v.* St. Andrews, 1 Mod. 112. Anon. 1 Vent. 256. 1 Hawk. c. 76. s. 9. 2 Saund. 159. n. 10, unless the parish have been relieved of their liability by a public statute. 3 Camp. 222. See 1 L. Raym. 725. 2 T. R. 106, 2 Barn. & Ald. 179.

Plea, that Others ratione tenuræ *are Bound to Repair.*

And J. S. and J. N., two of the inhabitants of the said parish of Fryern Barnet, by A. B. their attorney, for themselves and the rest of the inhabitants of the said parish, (excepting one A. C.) come into court here, and having heard the said indictment read, say, that our lord the King

ought not further to prosecute the said indictment against the inhabitants of the parish [illegible] aforesaid (excepting the said A. C. as aforesaid;) because they say that as to the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken, and in great decay, the said A. C., by reason of his tenure of certain lands and tenements called ———, lying and being in the said parish, ought to repair and amend the said part of the said highway so alleged to be ruinous, miry, deep, broken, and in decay as aforesaid, when and so often as there should be occasion, [as the said A. C., and all those who held the said lands and tenements for the time being, from time whereof the memory of man is not to the contrary, hitherto were used and accustomed, and of right ought to do and the said A. C. still of right ought to do:] And this they the said J. S. and J. N. are ready to verify, wherefore they pray judgment, and that they and the rest of the inhabitants of the said

[370] *parish of Fryern Barnet (excepting the said A. C. as aforesaid,) by the court here may be dismissed and discharged from the said premises in the said indictment above specified. See the precedents, C. C. C. 322. 391. 4 Went. 162. 171. 176. 184. 6 Went. 411. It is not necessary, (although usual) to allege the prescription, as in the above precedent between the crotchets. 2 Saund. 158 e. (n. 9.) It is usual, also, after stating the liability to repair *ratione tenuræ*, to add a special traverse of the liability of the parish to repair; but this is improper, and probably demurrable, as being a traverse of a conclusion of law. See 1 Saund. 23 n. 5. 2 Id. 159 a. (n. 10.) See, however, R. *v.* Inhabitants of Ecclesfield, 1 Barn. & Ald. 348. It may be necessary here to mention, that an individual cannot be bound by prescription to repair a highway, unless it be in respect of the tenure of his land, taking of toll, or other profit. 2 Saund. 158 f. (n. 9.) Nor can a parish get rid of its liability to repair, and throw the burthen upon an individual, by reason of any agreement between the individual and others. 3 East, 86.

Replication.

And hereupon N. W., (the clerk of the peace or the clerk of the arraigns) who prosecutes for our said lord the King in this behalf, says, that by reason of any thing in the said plea above pleaded in bar alleged, our said lord the King ought not to be precluded from prosecuting the said indictment against the said inhabitants of the said parish of Fryern Barnet: because he says * that the said A. C. ought not to repair or amend the said part of the said highway so alleged to be a ruinous, miry, deep, broken, and in decay as aforesaid, by reason of his said tenure, in manner and form, as in and by the said plea is above supposed and alleged: and this he the said N. W. prays may be enquired of by the country. And the said J. S. and J. N., for themselves and the rest of the inhabitants of the parish of Fryern Barnet aforesaid, do the like. Therefore let a jury, &c. &c.

Evidence.

In order to support this plea, the defendant must prove that A. C. is the occupier of the lands and tenements mentioned in the plea; for it is the occupier who is liable, whether he be owner or not. R. *v.* Watts, 1 Salk. 357. R. *v.* Buckneff, 7 Mod. 55. Prove also, either that these lands were formerly granted, to be holden by the service of repairing this part of the highway in question; or that A. C., or those who occu-

pied the lands before him, were always used and accustomed to repair it, from which circumstance such a grant will be presumed. Where the occupier of land is bound, *ratione tenuræ*, to repair *a highway, and the land is afterwards divided among several [371] occupiers, each occupier is liable for the repair of the whole, and he may have his remedy over against the others for contribution. R. *v.* Buccleugh, 1 Salk. 358. 2 Saund. 159 n. 9.

The record of an acquittal upon a former indictment against the parish with respect to the same piece of highway, is no evidence for the defendants; for it might have proceeded upon other grounds than the nonliability of the parish to repair. R. *v.* St. Pancras, Peake, 219. So, the record of a former conviction, although conclusive against the parish upon the plea of not guilty, Id., unless fraud or want of notice can be shewn, 2 Saund. 159 a. (n. 10,) yet it is not, it should seem, evidence against them, when they plead specially that an individual or corporation, &c. are bound to repair. But the record of a judgment after verdict against the parish, upon such a plea, would, it should seem, be conclusive evidence against the parish, upon their pleading the same plea to any subsequent indictment. See 3 Camp. 444.

Plea that a Particular Division of the Parish is Bound to Repair.

And J. S. and J. N., two of the inhabitants of a certain district or township called A. in the said parish of Fryern Barnet, by A. B. their attorney, for themselves and the rest of the inhabitants of the said district or township, come into court here, and having heard the said indictment read, say, that our lord the King ought not further to prosecute the said indictment, so far as respects the inhabitants of the district or township aforesaid; because they say that the said parish of Fryern Barnet is, and from time whereof the memory of man is not to the contrary, hitherto has been divided into three districts or townships called A., B., and C.; and that the inhabitants respectively of the several districts or townships of A. and C. have from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend the several and respective highways situate and lying in their said respective districts or townships, independently of each other; and that so much of the said highway in the said indictment mentioned as leads from ——— to ———, lies within the said district or township of A., and so much of the said highway as leads from ——— to ——— lies within the said district or township of B., and so much of the said highway as leads from ——— to ——— lies within the said district or township of C; (see R. *v.* Inhabitants of Bridekirk, 11 East, 304;) and that the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken, and in great decay, lies in that part of the said parish of Fryern Barnet, called the district or township of C.; and by reason of the premises aforesaid, the inhabitants of the said *district or [372] township of C. ought to repair and amend the part of the said highway last aforesaid, independently of the inhabitants of the said district or township of A. in the said parish: and this they the said J. S. and J. N. are ready to verify; wherefore, for themselves and the rest of the inhabitants of the said district or township of A., they pray judgment, and that they and the rest of the said inhabitants of the said district or township, by the court here may be dismissed and discharged from the said premises in the said indictment above specified. See 2 Saund. 160 n. 10. The inhabitants of B. should in this case plead a similar plea, and the in-

habitants of C. should (I think) plead the general issue. It is necessary that the prescription should be pleaded; for if judgment were given against the parish, whether after verdict or the general issue, or by default, it would be conclusive evidence afterwards that the whole parish is bound to repair, R. *v.* St. Pancras, Peake, 219, unless fraud could be shewn, Id., or unless the defence in the former case were managed by the district in which the road lay, and the other districts had no notice of the prosecution, in which case the court would give leave to the other districts to plead the prescription to the subsequent indictment. R. *v.* Townsend, Doug. 421. 2 Saund. 159 a. (n. 10.) and see 2 Camp. 494. See the precedents, C. C. C. 392. 6 Went. 394. 410, 411, and see particularly the case of R. *v.* Inhabitants of Ecclesfield, 1 Barn. & Ald. 348.

Replication.

Commencement, as ante, p. 370, *to the* *, *and then thus*:] That the inhabitants respectively of the several districts or townships of A. and C. have not, from time whereof the memory of man is not to the contrary, hitherto been used or accustomed to repair and amend the several and respective highways situate and lying in their said respective districts or townships, independently of each other: and this he the said N. W. prays may be enquired of by the country, &c. see ante, p. 370. Or the prosecutor may traverse the fact of the part of the road out of repair being within the district of C.

Evidence.

Prove that the districts of A. and C. have been accustomed, as far as aged witnesses can recollect, each to repair the highways within its own district. That the way is out of repair, is impliedly admitted by the plea; and that the part in question lies within the district of C., is impliedly admitted by the above replication. As to the effect of a record of a former conviction or acquittal of the parish, in evidence, see ante, p. 371.

[373] **Indictment against an Individual, for not Repairing* Ratione Tenuræ.

Same as the precedent, ante, p. 366, *to the* *, *and then thus*;] And that A. C., late of the said parish of Fryern Barnet in the county aforesaid, esquire, by reason of his tenure of certain lands and tenements called ———, lying and being in the said parish, ought to repair and amend that part of the highway aforesaid, so as aforesaid, being ruinous, miry, deep, broken, and in decay, when and so often as there should be occasion, [as the said A. C. and all those who held the said lands and tenements for the time being, from time whereof the memory of man is not to the contrary, hitherto were used and accustomed, and of right ought to do, and the said A. C. still of right ought to do,] and that the said A. C. hath not yet done the same, &c. See the precedents, C. C. C. 319. 4 Went. 190. Although usual, it is not necessary, to allege a prescription, as in the above precedent between the crotchets. 2 Saund. 158 e. (n. 9.) If land adjoining a highway not inclosed, be afterwards inclosed by the owner (not being done by virtue of a writ of ad quod damnum, or other legal proceeding,) he thereby renders himself liable, during the continuance of the inclosure, to repair that part of the highway adjoining the land so inclosed;

2 Saund. 161 (n. 12;) and he may be indicted for allowing it to be out of repair, the indictment setting out the special matter.

General Issue.

And the said A. C., by A. B. his attorney, comes into court here, and having heard the said indictment read, says, that he is not guilty of the said premises in the said indictment above specified and charged upon him; and of this he puts himself upon the country, &c. See ante, p. 49.

Evidence.

Prove the liability of A. C. to repair the part of the highway in question, *ratione tenuræ*, as directed ante, p. 370; and prove the highway being out of repair, as directed ante, p. 368.

On the other hand, the defendant, under the general issue, may prove either that the road is not out of repair, or that, instead of his being bound to repair it, the parish at large, or some district of it, by prescription or custom, or some individual *ratione tenuræ*, is bound to repair it; a special plea is not necessary in such a case. 2 Saund. 159 n. 10. However, if he plead it specially, after pleading the liability of the parish, district, or person, he must conclude with a special traverse of his own liability. Id. 159 a. (n. 10.)

**Indictment against a Particular District of a Parish, for Not Repairing.* [374]

Same as the precedent, ante, p. 366, *to the* *, *and then thus :*] And that the inhabitants of the district or township of C., in the said parish of Fryern Barnet in the county aforesaid, have from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend that part of the highway aforesaid, so as aforesaid, being ruinous, miry, deep, broken, and in decay, when and so often as there should be occasion, and that the said inhabitants of the said district or township aforesaid, have not yet done the same, &c. See the precedents, 4 Went. 160. 157. 178. 184. C. C. C. 320, and see 2 Saund. 158 f. (n. 9.) and R. *v.* Inhabitants of Ecclesfield, 1 Barn. & Ald. 348.

General Issue.

And J. S. and J. N., two of the inhabitants of the said district or township called C., in the said parish of Fryern Barnet, by A. B. their attorney, for themselves and the rest of the inhabitants of the said district or township, come into court here, and having heard the said indictment read, say, that they are not guilty of the said premises in the said indictment above specified and charged upon them; and of this they put themselves upon the country, &c. See ante, p. 49.

Evidence.

Prove the liability of the township of C. to repair the part of the highway in question, by proving that the township has been used and accustomed to do so heretofore. See ante, p. 372. And prove the highway being out of repair, as directed ante, p. 368.

On the other hand, the defendants, under the general issue, may prove

either that the road is in repair, or that, instead of their district being bound to repair it, the parish at large, or some other district in the parish, or some individual *ratione tenuræ*, is bound to repair it; a special plea is not necessary in such a case. 2 Saund. 159 (n. 10.) However, if it be pleaded specially, after pleading the liability of the parish, district, or person, the plea must conclude with a special traverse of the liability of the district indicted. Id. 159 a. (n. 10.) See the precedents, 4 Went. 161. 166. 6 Went. 414.

Indictment for Not Repairing a Bridge.

Middlesex, to wit: The jurors for our lord the King upon their
[375] oath present, that from time whereof the memory of *man is not to the contrary, there was and yet is a certain common public stone bridge, commonly called D. bridge, situate and being in the several parishes of B. and C. in the county of M., in the King's common highway leading from the town of H. in the county of H., towards and unto the city of London, used by and for all the liege subjects of our said lord the King and his predecessors, on foot, and with their horses, coaches, carts, and other carriages to go, return, pass, repass, ride, and labour at their free will and pleasure; and that the said bridge, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, and continually afterwards, until the day of the taking of this inquisition, at the several parishes of B. and C. aforesaid, in the county aforesaid, was and yet is very ruinous, broken, dangerous, and in great decay, for want of upholding, maintaining, amending, and repairing the same, so that the liege subjects of our said lord the King, upon and over the said bridge, with their horses, coaches, carts, and other carriages, could not, during the time last aforesaid, nor yet can, go, return, pass, repass, ride, and labour, as they before used and were accustomed to do, and still of right ought to do, without great danger of their lives, and the loss of their goods: to the great damage and common nuisance of all the liege subjects of our said lord the King, upon and over the said bridge, going, returning, passing, repassing, riding, and labouring, and against the peace of our lord the King, his crown and dignity. And that the said bridge is not within any city or town corporate; and that it cannot be known and proved that any hundred, riding, wapentake, city, borough, or parish, or any person certain, or any body politic, ought of right to make, rebuild, repair, or amend the said bridge; and that the inhabitants of the whole county of Middlesex aforesaid, ought to make, rebuild, repair, and amend the said bridge, when and so often as it should or shall be necessary, according to the form of the statute in such case made and provided. See the precedents, C. C. C. 313. 6 Went. 427.

If the bridge be within a city or town corporate, the inhabitants of such city or town corporate shall repair it; if within a riding, the inhabitants of the riding shall repair it; but in all other cases, the inhabitants of the county at large are liable to repair it, 22 Hen. 8. c. 5, and see 2 East, 342. 2 M. & S. 513. 262, unless they can throw the burthen of it upon some individual who *ratione tenuræ*, or the inhabitants of some parish or district, who, by immemorial custom, are bound to repair it. See the precedent, 4 Went. 178. 187, and see 5 Bur. 2594. 13 East, 220. 1 M. & S. 435. 12 East, 192. 16 East, 223, and see generally Burn, J., tit. Bridges. And if part of a bridge be within one county, &c., and the other part within another county, &c., each county shall repair that part

of the bridge which is within it. 22 H. 8. c. 5. s. 3. Besides the bridge, the county is bound to *repair 300 yards of the road, [376] adjoining each end of it. Id. s. 9, and see 7 East. 588. 5 Taunt. 284. 14 East, 477.

The pleas and evidence are the same, *mutatis mutandis*, with the pleas and evidence in the case of an indictment for not repairing a highway. See ante, p. 368—372. Upon an indictment against a private person or corporate body for not repairing, inhabitants of the county, &c. are competent witnesses for the prosecution. 1 Ann. st. 1. c. 18. s. 13.

See a precedent of an indictment for not repairing a county jail. C. C. C. 318.

Other Cases of Nuisance.

1. By stat. 10 & 11 W. 3. c. 17, all lotteries are declared to be public nuisances, (unless specially sanctioned by act of parliament.) 2. Stage plays unlicensed, booths and stages for rope dancers, mountebanks, and the like, are also public nuisances. 4 Bl. Com. 167, 168. 3. The making and selling of fireworks and squibs, or throwing them about in the street, is declared to be a common nuisance, by stat. 9 & 10 W. 3. c. 7. 4. A common scold is deemed a public nuisance. 4 Bl. Com. 169. 5. All schemes of commerce, &c. by means of subscriptions, are declared to be public nuisances, and subject the offenders to the penalties of *præmunire*. 6 G. 1. c. 18, and see 14 East, 406. 4 Taunt. 587. 9 East, 516.

Sect. 3.

OPEN AND NOTORIOUS LEWDNESS.

Indictment against a Man for Publicly Exposing his Naked Person.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, being a scandalous and evil disposed person, and devising, contriving, and intending the morals of divers liege subjects of our lord the King to debauch and corrupt, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, on a certain public and common highway there situate, in the presence of divers liege subjects of our said lord the King, and then and there being, and within sight and view of divers other liege subjects through and on the said highway then and there passing and repassing, unlawfully, wickedly, and scandalously did expose to the view of the said persons so present, and so passing and repassing as aforesaid, the body and person of him the said J. S. naked and *uncovered, for a long space of time, to wit, for the space of [377] one hour: to the great scandal of the said liege subjects of our said lord the King, to the manifest corruption of their morals, in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. See R. *v.* Sir Charles Sedley, 10 St. Tr. Ap. 93. 1 Sid. 168. 1 Keb. 620, and see R. *v.* Gallard, 1 Sess. Ca. 231. Prove the offence as laid; the time is not material.

As to selling obscene prints or books, see ante, p. 295; and as to keeping a bawdy house, see ante, p. 362.

SECT. 4.

GAMING.

Indictment for Winning Money at Cards, &c. by Fraud.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, at the parish aforesaid, in the county aforesaid, by fraud, shift, cozenage, circumvention, deceit, unlawful device, and *ill* practice, in playing at and with cards, to wit, at a certain game of cards called *rouge et noir,* with one J. N., unlawfully did win, obtain, and acquire to himself a large sum of money, to wit, the sum of sixty pounds, of the monies of the said J. N. [*or* certain valuable things, to wit, one ——— of the value of ———, and one ——— of the value of ———, of the goods and chattels of the said J. N., *or* being the property *of* the said J. N. :] to the great damage of the said J. N., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

The defendant shall forfeit five times the value of the money or other thing won, shall be deemed infamous, and shall suffer corporal punishment as in the case of perjury. 9 Ann. c. 14. s. 5. As to the penalty, however, it is not included in the judgment; but an action must afterwards be brought to recover it. R. *v.* Lookup, 2 Str. 1048. This section of the statute extends to "cards, dice, tables, tennis, bowls, and other game or games whatsoever;" it extends also, not only to the winner, but also [378] to persons "bearing a *share or part in the stakes, wagers, or adventures," or "betting on the sides or hands of such as do play as aforesaid." See the precedents, 6 Went. 383. 391. If it be doubtful at what game they played, add a count omitting the name of the game.

Evidence.

To maintain this indictment, it is necessary not only to prove that J. S. won of J. N. the money, &c. laid in the indictment, or some part of it, see R. *v.* Darley, 1 Stark. R. 359, but also to prove that it was won "by fraud, shift, cozenage, circumvention, deceit, unlawful device, or ill practice." A variance between the indictment and evidence, as to the game played (if stated,) would be fatal.

Indictment for Winning More than Ten Pounds at One Sitting.

Commencement as in the last precedent.] In the county aforesaid, by playing at and with cards, at a certain game of cards called *rouge et noir;* with one J. N., unlawfully did win of the said J. N., at one time and sitting, above the sum and value of ten pounds, that is to say, the sum of sixty pounds, of the monies of the said J. N.: to the great damage of the said J. N. &c. &c. as in the last precedent.

The defendant shall forfeit five times the value of the money or other thing won. 9 Ann. c. 14. s. 5. See ante, p. 377. Upon this statute, however, the judgment was merely *quod convictus est*, and an action must afterwards have been brought for the penalty: R. *v.* Lookup, 2 Str. 1048: but by 18 G. 2. c. 34. s. 8, the court shall set the fine of five times the value, &c.; which fine, after deducting from it such charges as the court shall deem reasonable to be allowed to the prosecutor and for evidence, shall go to the poor of the parish or place where the offence was committed.

Evidence.

All the prosecutor has to prove is, that J. S. won of J. N., at one sitting, a sum exceeding ten pounds. Where two persons played at cards from Monday evening to Tuesday evening, without intermission, except an hour or two at dinner, &c., it was holden to be one sitting, within the meaning of the above statutes. Bones *v.* Booth, 2 W. Bl. 1226.

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*Sect. 5. [379]

OFFENCES RELATING TO GAME.

Indictment for going Armed in the Night Time, for the Purpose of Destroying Game.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, being an idle and disorderly person, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, having then entered into a certain forest [chase, park, wood, plantation, close, or other open or inclosed ground] there situate, belonging to J. N., with the intent then and there illegally to destroy, take, and kill, and to aid, abet, and assist divers other persons to the jurors aforesaid unknown, illegally to destroy, take, and kill game and rabbits, was, about the hour of eleven in the night of the same day, there found in the [forest] aforesaid, armed with a gun, [cross-bow, fire arms, bludgeon,] and other offensive weapons: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. If it be doubtful whether the forest, &c. belong to J. N., add another count omitting the words "belonging to J. N."

Misdemeanor, punishable with transportation, or with the like punishment as other misdemeanors, as the court shall adjudge. 57 G. 3. c. 9. s. 1. See ante, p. 132, as to stealing, hunting, or killing deer;—p. 133, as to being in a deer park, armed and disguised;—134, as to robbing a warren or preserve for hares, or being in such warren or preserve armed and disguised;—133, as to stealing conies;—134, as to stealing fish;—184, as to breaking down the head or mound of a fish pond.

Evidence.

1. Prove that the defendant was in the forest or other place described in the indictment, in the night time: that is to say, between the hours of six in the evening and seven in the morning, from the 1st Oct., to the 1st Feb.; between seven in the evening and five in the morning, from

1st Feb., to the 1st April; and between nine in the evening and four in the morning, during the remainder of the year. 57 G. 3. c. 9. s. 1.

[380] *2. Prove that he was armed with a gun, or other weapon mentioned in the indictment. See ante, p. 350, 351.

3. Prove that he was in the forest, &c., with the intent stated in the indictment, by proving circumstances from which the jury may fairly presume it: as, for instance, that he had actually killed game or rabbits there; or that he had nets, snares, or other engines used for the purpose of taking or killing them, about him at the time; or the like.

SECT. 6.

TAKING UP DEAD BODIES.

Indictment for Digging up and Carrying Away a Dead Body.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, the church yard of and belonging to the parish church of the said parish there situate, unlawfully and wilfully did break and enter, and the grave there in which one J. N. deceased, had lately before then been interred and then was, with force and arms, unlawfully, wilfully, and indecently did dig open, and then and there the body of him the said J. N. out of the grave aforesaid, unlawfully, wilfully, and indecently did take and carry away: in contempt of our lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. R. *v.* Lynn, 2 T. R. 733. If the body cannot be recognized, state it to be the body of a person to the jurors aforesaid unknown.

Evidence.

Prove that the defendant dug up the body; and the slightest removal of it would, it seems, be sufficient to constitute the offence. Or, prove that the body was found in the defendant's possession, and that it had been previously interred in the church yard mentioned in the indictment; from which the jury may fairly presume that the defendant was the person who dug it up or removed it.

*Sect. 7.

DISTURBING PUBLIC WORSHIP.

Indictment for Disturbing a Congregation of Baptists, During Divine Service.

Westmoreland, to wit: The jurors for our lord the King, upon their oath present, that heretofore, to wit, at the general quarter sessions of the peace holden at Appleby, in and for the county of Westmoreland, the ——— day of ———, in the ——— year of the reign of our sovereign lord George the Fourth, of the united kingdom of Great Britain, and Ireland King, defender of the faith, before A. B. and C. D. esquires, and others their associates, justices of our said lord the King, assigned to keep the peace of our said lord the King in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, J. N clerk, teacher, and preacher to a congregation of protestants dissenting from the church of England scrupling infant baptism, did then and there, pursuant to the statute in such case made and provided, certify to his Majesty's justices of the peace assembled in quarter sessions aforesaid, that he had appointed a certain house situate at ——— in the parish of B. in the county aforesaid, therein to assemble and meet for religious worship, and which was then and there duly registered and recorded, according to the directions of the statute in such made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, a congregation of protestants dissenting from the church of England, of which the said J. N. was then the teacher and preacher, were assembled for the public worship and service of Almighty God in the house aforesaid, so certified, registered, and recorded as aforesaid; and that J. S. late of the parish aforesaid, in the county aforesaid, labourer, J. W. late of the same, carpenter, and E. W. late of the same, labourer, afterwards, to wit, on the day and year last aforesaid, whilst the said congregation were so assembled as aforesaid, and during divine service, at the parish aforesaid, in the county aforesaid, unlawfully, willingly, and of purpose, maliciously and contemptuously did come into the said congregation, during divine service as aforesaid, and did then and there willingly *and of purpose, maliciously and contemptuously disquiet and disturb the said congregation, [by then and there talking, cursing, and swearing with a loud voice, and also by talking with a loud voice to the said J. N., he the said J. N. then and there being in the pulpit,] the doors of the said meeting house and place where the said congregation were so assembled as aforesaid, not being then locked, barred, or bolted: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*2d Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W., and E. W., afterwards, to wit, on the day and year last aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, did willingly and of purpose, maliciously and contemptuously come into a certain congregation of protestants dissenting from the church of England, then and there assembled for the worship and service of Almighty God, in a certain meeting house there situate, and the said congregation then and there wilfully, willingly, and of purpose, maliciously and contemptuously did disquiet and disturb, [by talking, laughing, swear- [382]

ing, and cursing with a loud voice,] (the said meeting house, where the said congregation were so assembled as aforesaid, being then and long before certified, registered, and recorded, according to the direction of the statute in such case made and provided, and the doors of the said meeting house and place where the said congregation were so assembled, not being then locked, barred, or bolted :) against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

Fine, 40*l*. 52 G. 3. c. 155. s. 12, each defendant. R. *v.* Hube & al. 5 T. R. 542. See the like provision as to catholic chapels, 31 G. 3. c. 33. s. 10. This offence may be tried at the sessions, 52 G. 3. c. 155. s. 12, or in the King's Bench, see 3 Bur. 1683, or at the assizes, if removed from the sessions by certiorari. 5 T. R. 542. 4 M. & S. 508.

Evidence.

1. Prove that the chapel or meeting house was certified and registered, as alleged in the indictment; which may be done by the clerk of the peace producing the book, &c. in which the same was registered, or perhaps by an examined copy of the entry. See ante, p. 84, 87. Where it was objected that the statute did not extend to a congregation of foreign Lutherans, though registered, the objection was overruled. R. *v.* Hube and al. Peake, 132. It is immaterial whether the *officiating* clergyman have qualified according to the statute, or *not*. *Id.*

2. Prove the disturbance, as stated in the indictment. Where, [383] in a contest for the situation of clerk to a meeting *house, one clerk pulled the other from the desk, it was holden to be a disturbance within the statute. R. *v.* Hube & al. 5 T. R. 542, although the statute certainly was intended principally to apply to persons who with violence oppose a form of worship inconsistent with their own ideas and tenets.

Sect. 8.

REFUSING TO EXECUTE A PUBLIC OFFICE.

Indictment for Refusing to Serve the Office of Chief Constable.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that at the general quarter sessions of the peace, holden at the New Sessions House on Clerkenwell Green, in and for the county of Middlesex, on Saturday the eighth day of May, in the third year of the reign of our sovereign lord George the Fourth, to wit, at the parish of ———, in the county aforesaid, before A. B. and C. D. esquires, and others their associates, justices of our said lord the King, assigned to keep the peace of our said lord the King in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, one J. S., late of the parish of B. in the county of M., shoemaker, then and long before being an inhabitant and residing in the parish last aforesaid, within the hundred of Ossulston in the said county, and a fit and able person to execute the office of chief constable within the said hundred, at the said sessions, by the justices aforesaid, in due manner was then and there elected to be one of the chief constables of the hundred aforesaid, in the room and stead of one J. N.; whereof the said J.

S. afterwards, to wit, on the day and year aforesaid, at the parish last aforesaid, in the county aforesaid, had notice. Nevertheless the said J. S., not regarding his duty in that behalf, but contriving and intending the due execution of justice to hinder and prevent, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, obstinately, and contemptuously did refuse, and from thence continually until the day of the taking of this inquisition, unlawfully, wilfully, obstinately and contemptuously hath refused, and still doth refuse, to take upon himself and execute the said office of chief constable within the hundred aforesaid, to wit, at the parish last aforesaid, in the county aforesaid: contrary to his duty in that behalf, in *manifest contempt and delay of justice, and against the peace [384] of our lord the King, his crown and dignity. The indictment must shew by whom the defendant was elected, and that he had notice. R. *v.* Harpur, 5 Mod. 96.

Fine or imprisonment, or both.

Evidence.

1. Prove the election, by getting the clerk of the peace to produce the minutes of it. 2. Prove the service of a notice upon the defendant, informing him of his election, and requiring him to attend before the justices to be sworn. 3. And prove either an actual refusal to serve the office; or that he did not attend to be sworn in, which would be *primâ facie* evidence of a refusal.

On the other hand, the defendant, as a defence, may prove: 1. that he is not an inhabitant of the place for which he is chosen. 1 Burn, J., tit. constable, s. 2;—2. that he is president or one of the commons or fellows of the faculty of physic in London; 32 H. 8. c. 40;—3. that he is a surgeon, duly admitted, and practising in London; Semb. See 5 H. 8. c. 6. 18 G. 2. c. 15. R. *v.* Pond Comyns, 312;—4. that he is an apothecary, free of the company of apothecaries in London, or (if he reside in the country) having served seven years' apprenticeship; 6 & 7 W. 3. c. 4;—5. that he is a practising barrister or attorney; Semb. 2 Hawk. c. 10. s. 39;—6. that he is an alderman of London; 2 Hawk. c. 10. s. 40;—7. that he is a serjeant, corporal, or private man, serving in the militia; 26 G. 3. c. 107. s. 130;—8. that he is a protestant dissenting minister, and has taken the oaths, &c. 1 W. & M. c. 18. s. 11, and does not follow any trade, occupation, &c. for his livelihood, excepting that of schoolmaster; 25 G. 3. c. 155. s. 9;—9. that he is a catholic clergyman, and has taken the oaths prescribed; 18 G. 3. c. 60. s. 8;—10. that he is a foreigner: R. *v.* De Mierre, 5 Bur. 2787;—11. that he has a special exemption from the crown, from serving in parish offices, &c. R. *v.* Clark, 1 T. R. 679.

But it is no answer to say that he is a protestant dissenter or catholic; for he may serve by deputy, if he do not wish to take the oaths. 1 W. & M. c. 18. s. 7. 31 G. 3. c. 32. s. 7. Nor is it any defence, that he is an officer of the King's guards, 2 Hawk. c. 10. s. 41, or a younger brother of Trinity House, 1 T. R. 679, for the same reason. Nor is it any defence, that he resides in the jurisdiction of a leet within the hundred or place for which he is elected; R. *v.* Genge, Cowp. 13; or that no constable had ever before been appointed for the place. 2 Keb. 557.

**Indictment for Refusing to Serve the Office of Petty Constable.*

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B. in the county of M., shoemaker, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, and long before, was and still is an inhabitant and resiant within the parish aforesaid, in the county aforesaid, and a fit and able person to execute the office of constable for the said parish; and that the said J. S., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, at a vestry then and there duly holden in and for the said parish, at the vestry room of and in the parish church of the said parish there situate, lawfully, in due manner and form, and according to the custom of the said parish, was elected and chosen by the men inhabiting and resiant within the same parish, to be one of the constables of and for the said parish, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable; and that the said J. S., afterwards, to wit, on the day and year aforesaid at the parish aforesaid, in the county aforesaid, had due notice thereof, and then and there was required to appear before A. C., esquire, then and yet being one of the justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers *felonies*, *trespasses*, and other misdeeds committed in the said county, on the fifth day of May, in the year aforesaid, to take his oath for the due execution of the said office of constable for the said parish, according to the duty of that office. Nevertheless the said J. S., not regarding his duty in that behalf, but contriving and intending the due execution of justice to hinder and prevent, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, obstinately, and contemptuously did refuse, and from thence continually until the day of the taking of this inquisition, unlawfully, wilfully, obstinately, and contemptuously hath refused, and still doth refuse, to take his said oath for the due execution of the said office of constable, or in anywise to take upon himself or execute the said office: contrary to his duty in that behalf, in manifest contempt and delay of justice, and against the peace of our lord the King, his crown and dignity. See a similar precedent, where the defendant was elected at the leet, Burn, J., tit. constable, C. C. C. 152. 4 Went. 351. 332;—and the like, where the election was at a court of wardmote for one of the wards in the city of London, C. C. C. 147.

As to the evidence, see ante, p. 384.

[386] **Indictment for Refusing to Serve the Office of Overseer of the Poor.*

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B. in the county of M., shoemaker, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, and long before, was and still is a substantial householder in the parish aforesaid, in the county aforesaid, and an inhabitant and resiant in the said parish, and a fit and able person to execute the office of overseer of the poor for the said parish; and that the said J. S., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, by warrant under the hands and seals of A. C., esquire, and J. P., clerk, two of the justices of our said lord the King as-

signed to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county (one of the said justices being of the quorum, and both of the said justices then dwelling in [*or* near] the parish aforesaid in the county aforesaid,) was lawfully nominated and appointed to be one of the overseers of the poor of the said parish, according to the direction of the statute in such case made and provided; whereof the said J. S., afterwards, to wit, on the day and year aforesaid, at the parish aforesaid in the county aforesaid, had notice. Nevertheless the said J. S., not regarding his duty in that behalf, but contriving and intending to render the said warrant of appointment of no effect, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, obstinately, and contemptuously did refuse, and from thence continually until the day of the taking of this inquisition, unlawfully, wilfully, obstinately, and contemptuously hath refused, and still doth refuse, to take upon himself and execute the said office of overseer of the poor of the said parish, to wit, at the parish aforesaid, in the county aforesaid: contrary to his duty in that behalf, to the great damage of the said parish and the parishioners thereof, in delay of the provision for and care of the poor of the said parish, in contempt of our lord the King and his laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. See the precedents, 4 Went. 338. 349. In stating the appointment, let the terms of the warrant be particularly attended to.

Evidence.

Produce the warrant, and prove it. Prove that the *defend- [387]
ant had notice of it, as mentioned in the indictment. And prove either that he actually refused to execute the office; or that he did not afterwards execute it, from which his refusal to execute it will be implied. The same causes of exemption from serving the office of constable, are in general equally applicable to the office of overseer of the poor. See ante, p. 384.

*BOOK II.

PART III.

CONSPIRACY.

Indictment for a Conspiracy to Charge a Man with a Crime.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B. in the county of M., labourer, and A. his wife, and J. W., late of the same, carpenter, and E. W., late of the same, labourer, being evil disposed persons, and wickedly devising and intending not only to deprive one J. N. of his good name, fame, credit, and reputation, but also to subject him, as far as in them lay, to the pains and penalties by the laws of this kingdom made and provided against, and inflicted upon persons guilty of [rape] on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, with force and arms, at the parish aforesaid, in the county aforesaid, did amongst themselves, conspire, combine, confederate, and agree together, falsely to charge and accuse the said J. N., that he the said J. N. had then lately before [feloniously ravished and carnally known the said A., violently and against her will, and consent.]

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. and A. his wife, and J. W., and E. W., afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst themselves had as aforesaid,* [here set out the overt acts as in high treason; See ante, p. 265 et seq.; introducing the second, and each of the subsequent
[389] overt acts, *thus: And the jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of, and according to the said conspiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W., and E. W., had as aforesaid, they the said &c. on &c. at &c. &c. As thus, (continuing the indictment from the above *:)] falsely and unlawfully, in the presence and hearing of divers persons, did charge and accuse the said J. N. with and of the rape aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of, and according to the said conspiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W., and E. W., had as aforesaid, she the said A.

afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did upon her oath falsely charge and accuse the said J. N., before A. C., esquire, then and yet being one of the justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, that he the said J. N., had then lately before feloniously ravished and carnally known her the said A., violently, and against her will and consent.

AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that in further pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W., and E. W., had as aforesaid, she the said A., by the name of A. the wife of J. S., afterwards, to wit, at the General Quarter Sessions of the peace of our said lord the King, holden at the New Sessions House on Clerkenwell Green, in and for the county of Middlesex aforesaid, on Monday the ——— day of May, in the year aforesaid, before A. B., and C. D., esquires, and others their associates, justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, did falsely exhibit a certain bill, commonly called a bill of indictment, against the said J. N., by the name and addition of J. N., late of the parish of C., in the county of M., yeoman, to P. C., esquire, [here insert the names of the grand Jurors to whom the indictment for rape was exhibited] good and lawful men of the said county, then and there sworn, and charged to enquire for our said lord the King, for the body of the said county, which said bill was by the said jurors then and there returned into the said court, before the justices of our lord the King last aforesaid, and others their fellows aforesaid, thus indorsed: 'Not found:' which said bill is in these words, that is to say: [here set out the indictment verbatim; and you may then add, with intent to obtain and acquire to them the said J. S. and A. his *wife, and the [390] said J. W., and E. W., of and from the said J. N., divers sums of money for compounding the said pretended felony and rape so falsely charged upon the said J. N., as aforesaid, *if this be the fact, and that there will be no difficulty in proving it*:] to the great damage, scandal, infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. See the following precedents: a conspiracy to charge a man with forgery, 4 Went. 96, sodomy, C. C. C. 126, larceny, C. C. C. 135, and see 3 Bur. 1320, receiving stolen goods, C. C. C. 125, poisoning horses, 4 Went. 98.

Fine or imprisonment, or both.

A conspiracy is an agreement between two or more persons,—1. Falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling towards the party, or for the purpose of extorting money from him;—2. Wrongfully to injure or prejudice a third person, or any body of men, in any other manner;—3. To commit any offence punishable by law;—4. To do any act with intent to pervert the course of justice;—5. To effect a legal purpose, with a corrupt intent, or by improper means;—6. To which may be added, conspiracies or combinations by journeymen to raise their wages, &c.

Thus, under the first head,—a conspiracy to charge a man falsely with treason, felony, or misdemeanor, is indictable; but it is not an indictable

offence, for two or more persons to consult and agree to prosecute a person who is guilty, or against whom there are reasonable grounds of suspicion. R. *v.* Best, 1 Salk. 174.

Under this second head,—a conspiracy to impose pretended wine upon a man, as for true and good Portugal wine, in exchange for goods; R. *v.* Macarty & al. 2 L. Raym. 1179; a conspiracy by a female servant and a man whom she got to personate her master and marry her, in order to defraud her master's relations of a part of his property after his death; R. *v.* Taylor & al. 1 Leach, 37; a conspiracy to injure a man in his trade or profession; R. *v.* Eccles, 1 Leach, 274; a conspiracy to charge a man as the reputed father of a bastard; 1 Hawk. c. 72. s. 2; a conspiracy to raise the prices of the public funds by false rumours, as being a fraud upon the public; 3 M. & S. 67; a conspiracy by persons to cause themselves to be reputed men of property, in order to defraud tradesmen; R. *v.* Roberts & al. 1 Camp. 399; a conspiracy to defraud the public by issuing and negotiating bills in the name of a fictitious and pretended banking firm; R. *v.* Hevey & al. 2 East, P. C. 858; a conspiracy by violence, threats, contrivance, or other sinister means, to procure the marriage of a pauper of one parish to a pauper of another, in order to charge one of the parishes with the maintenance of both: R. *v.*
[391] Tarrant, 4 Bur. *2106, and see 1 East, P. C. 461, 462. 8 Mod. 320: for these, severally, it has been holden, an *indictment* will lie. But an indictment will not lie for a conspiracy to kill game, or commit any other mere civil trespass, R. *v.* Turner, 13 East, 228, or for a conspiracy to sell a man an unsound horse, R. *v.* Pywell & al. 1 Stark. 402, or for a conspiracy to deprive a man of an office under an illegal trading company. R. *v.* Stratton, 1 Camp. 549 n.

Under the third head,—a conspiracy to commit a felony or misdemeanor, is indictable. See R. *v.* Pollman & al. 2 Camp. 229.

Under the fourth head—a conspiracy by certain justices of peace to certify that a highway was in repair, when they knew it to be otherwise, was holden to be indictable. R. *v.* Mawbey & al. 6 T. R. 619. So, where several persons conspired to procure others to rob one of them, in order, by convicting the robber, to obtain the reward then given by statute in such a case, and the party who accordingly committed the robbery, was afterwards convicted and actually executed: these persons were indicted for the conspiracy, and convicted. R. *v.* Macdaniel & al. 1 Leach, 45.

As to the fifth head, namely, effecting a legal purpose with a corrupt intent, or by improper means, see 1 Leach, 37. 3 Bur. 1439. 1 Wils. 41. 8 Mod. 321. And as to the sixth head, see post, p. 394.

1. The indictment must in the first place charge the conspiracy. And in stating the object of the conspiracy, the same certainty is not required, as in an indictment for the offence, &c. conspired to be committed; as, for instance, an indictment for conspiring to defraud a person "of divers goods," has been holden sufficient. Ante, p. 18; and see 3 Bur. 1320.

2. It is usual to set out the overt acts, that is to say, those acts which may have been done by any one or more of the conspirators, in order to effect the common purpose of the conspiracy. But this is not essentially necessary: the conspiracy itself is the offence; and whether any thing have been done in pursuance of it, or not, is immaterial. R. *v.* Gill & al. 2 Barn. & Ald. 204, and see 2 L. Raym. 1167. 2 Bur. 993. 3 Bur. 1321.

3. In an indictment for a conspiracy to indict or charge a man with an offence, it is not necessary to aver that the man is innocent of the offence;

R. *v.* Kinnersley & al. 1 Str. 193; for he shall be presumed to be innocent, until the contrary appear. See R. *v.* Best, 1 Salk. 174. R. *v.* Spragg, 2 Bur. 993. So, in an indictment for conspiring to pervert the course of justice, by producing a false certificate of justices of peace that a road, indicted, was in repair, in order to influence the judgment of the court: it is not necessary to allege that the defendants knew the certificate to be false; it is sufficient that *they agreed to certify [392] the fact as true, without knowing it to be so. R. *v.* Mawbey, 6 T. R. 619.

4. The venue may be laid in the county in which the conspiracy actually took place, or in a county in which any one of the defendants did an act in furtherance of the common object of the conspirators. Ante, p. 5.

It may be necessary to observe, that it has been holden that the Quarter Sessions have jurisdiction of conspiracy. R. *v.* Rispal, 3 Bur. 1320. 1 W. Bl. 368.

Evidence.

Prove the conspiracy, as described in the indictment, and that the defendants were engaged in it; or prove circumstances from which the jury may presume it. See R. *v.* Parsons & al. 1 W. Bl. 392. And the prosecutor may go into general evidence of the nature of the conspiracy before he gives evidence to connect the defendant with it. R. *v.* Hammond & al. 2 Esp. 718.

The acts also of any one of the conspirators, in furtherance of the common design, may be given in evidence against all. Ante, p. 268. And if any one overt act be proved in the county where the venue is laid, other overt acts either of the same or others of the conspirators, may be given in evidence, although committed in other counties. Ante, p. 268. R. *v.* Bowes, 4 East, 171 n. But before you give in evidence the acts of one conspirator against another, you must prove the existence of the conspiracy, that the parties were members of the same conspiracy, and that the act in question was done in furtherance of the common design. Ante, p. 268.

The wife of one of the conspirators shall not be allowed to give evidence for or against the others. See ante, p. 97.

As conspiracy must be by two persons at least, one cannot be convicted of it, unless he have been indicted for conspiring with persons to the jurors unknown. 1 Hawk. c. 72. s. 8. But one person alone may be tried for a conspiracy, provided the indictment charge him with conspiring with others, who have not appeared, R. *v.* Kinnersley & al. 1 Str. 193, or who are since dead. R. *v.* Nichols & al. 2 Str. 1227.

Indictment for a Conspiracy to Commit a Crime.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., shipowner, J. W., late of the same place, yeoman, and E. W., late of the same place, mariner, being evil disposed persons, and wickedly devising and intending to defraud and prejudice certain persons hereinafter mentioned, on the third day of May, in the third year of the reign of our sovereign *lord George the Fourth, with force and arms, at the [393] parish aforesaid, in the county aforesaid, did amongst themselves conspire, combine, confederate, and agree together, falsely and

fraudulently to cheat and defraud certain underwriters hereinafter mentioned, of divers large sums of money:

AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that the said J. S., J. W., and E. W., afterwards, to wit, on the [*date of the policy*] in the year aforesaid, at the parish aforesaid, in the county aforesaid, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst themselves had as aforesaid, did cause and procure a certain ship called the ———, and certain goods in and on board of the said ship, to be insured by certain underwriters, to wit, by A. B., C. D., E. F., and G. H., and the said underwriters then and there severally underwrote a certain policy of insurance upon the said ship, and upon the said goods so loaden on board the said ship as aforesaid, upon and for a voyage from the port of London to the island of Saint Vincent in the West Indies.

AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that the said J. S., J. W., and E. W., afterwards, and after the said ship sailed from the port of London aforesaid upon the voyage aforesaid, to wit, on the fourth day of June, in the year aforesaid, in further pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst themselves, had as aforesaid, did remove and unlade from on board the said ship, divers goods insured as aforesaid, of great value, to wit, of the value of four hundred pounds, before the said ship had reached her port or place of destination aforesaid, to wit, at the parish aforesaid, in the county aforesaid.

AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that in further pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst themselves had as aforesaid, the said J. S., J. W., and E. W., afterwards, to wit, on the twentieth day of June, in the year aforesaid, on the high seas, to wit, at the parish aforesaid, in the county aforesaid, did cut, bore, and make, and did cause and procure to be cut, bored, and made, divers holes in the bottom and sides of the said ship or vessel, with intent thereby to sink, cast away, and destroy the said ship and the goods in and upon the said ship so laden as aforesaid, and with intent and design then and thereby wilfully and maliciously to prejudice the said several persons who had so underwritten the said policy of insurance upon the said ship, and upon the goods so therein and thereupon loaden as aforesaid: to the great damage of the said A. B., C. D., E. F., and G. H., who had so underwritten the said policy as aforesaid, and against the peace of our lord the King, his crown and dignity. See ante, p. 181, and the precedent, 6 Went. 387; and see the following precedents: of an [694] *indictment for a conspiracy to embezzle money collected on a brief, C. C. C. 136;—to cheat a man out of money, by pretending to secure to him an annuity, 4 Went. 80. 89;—to get from a man his acceptances, upon pretence of getting them discounted, 6 Went. 378;—to defraud a man of money, under pretence of procuring a place, C. C. C. 127. 133;—to blow up the walls of a prison, C. C. C. 422;—to escape out of prison, 4 Went. 116;—to raise the price of victuals (salt,) C. C. C. 130;—to obtain a *nolle prosequi* to an indictment by fraud, C. C. C. 138;—to give a false certificate of a road being in repair, 4 Went. 125, and see R. *v.* Mawbey, 6 T. R. 619;—to throw a burthen upon a parish, by the parish officers of another parish persuading a pauper of the former parish to marry a female pauper of their parish, C. C. C. 128;—to bring a pregnant pauper to settle in a parish, 4 Went. 124;—wrongfully to hold a man to bail, 4 Went. 94;—to with-

draw customers from a brewer, 4 Went. 106;—to injure gunmakers in their trade, 4 Went. 439;—to ruin a player in his profession, 6 Went. 443;—to accuse a woman of incontinence with defendant, in order to make her marry him, 4 Went. 79.

Evidence.

As to the evidence, see ante, p. 392. Prove the conspiracy either expressly, or prove one or more of the overt acts laid, and that the defendants were either engaged in the commission of them, or caused or procured their commission, from which the jury may fairly presume the conspiracy.

As to combinations by workmen, to enhance their wages, &c. &c. see stat. 39 & 40 G. 3. c. 106, which inflicts a punishment for the offence, upon a summary conviction before two magistrates; and see Burn, J. tit. Servant, s. 27. See also forms of indictments at common law, C. C. C. 127. 134. 4 Went. 100. 103. 113. 120. 6 Went. 375.

*BOOK II.

PART IV.

ACCESSARIES, &c.

Indictment of a Principal in the Second Degree.

After stating the offence of the principal in the first degree, and immediately before the conclusion of the indictment, charge the principal in the second degree thus:] And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W. late of the parish aforesaid, in the county aforesaid, labourer, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously was present, aiding, abetting, and assisting the said J. S., the [felony and larceny] aforesaid, to do and commit: [against the peace, &c.] In an indictment for murder, this is inserted immediately before the concluding clause, and so the jurors, &c.; and this clause then charges both the principals in the first and second degree with the murder, thus: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S. and J. W., the said J. N., in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder: against the peace, &c. See ante, p. 210, 211.

Felony, with or without clergy, according to circumstances. Where a statute creates a felony, and excludes persons guilty thereof from the benefit of clergy, without making provision as to persons present aiding and abetting: principals in the second degree are thereby ousted of clergy, as well as principals in the first degree. R. *v.* Midwinter & al., [396] Fost. App. 415. Coalheavers' *case, 1 Leach, 66. So, where a statute takes away clergy from a common law felony, by name, (as in the case of murder, rape, sodomy, robbery and burglary,) those present aiding and abetting in the offence are impliedly ousted of clergy, although the statute make no mention of them. 1 Hale, 537. Fost. 357. But where a statute takes away clergy from the person committing a common law felony, and not from the offence itself by name (as in the case of the statute 1 J. 1. c. 8, of stabbing, and the statutes relative to larceny in a dwelling house, &c.,) those present aiding and abetting merely shall have their clergy, that person only who actually commits the offence being deemed to be ousted of clergy by the statute. Fost. 356, 357. R. *v.* Page & al., Fost. 355. Yet in this latter case, if the accessary be expressly ousted of clergy by the statute, as well as the person committing the offence, it must be deemed to be virtually an exclusion of the princi-

pal in the second degree from clergy, by necessary implication. If a wife be present aiding and abetting in the murder of her husband, she is guilty of petit treason, although the party killing be guilty of murder only. 1 Hale, 378, 379.

In the case of felony at common law, where clergy has not been taken away; and in cases of felony at common law or by statute, where the principal in the first degree is expressly, and the principal in the second degree is by construction of law, ousted of clergy (*vide supra:*) the pleader may charge the principal in the second degree, either as a principal in the first degree (for proof that he was present aiding and abetting, will, in such a case, maintain an indictment charging him with having actually committed the offence; see Mackally's case, 9 Co. 67 b. 1 Hale, 438;) or as being present aiding and abetting, as in the form above given, at his option.

Evidence.

The defendant must be proved to have been either actually or constructively present, aiding in or abetting the commission of the offence. It is not necessary that he should be actually present; if he be outside the house watching to prevent surprise, or the like, whilst his companions are in the house committing the felony, such constructive presence is sufficient to make him principal in the second degree. Fost. 350. See R. *v.* Borthwick & al., 1 Doug. 207. So, it is not necessary to prove that he actually aided in the commission of the offence: if he watched for his companions, in order to prevent surprise; or remained at a convenient distance, in order to favour their escape, if necessary; or was in such a situation as to be able readily to come to their assistance, and that the knowledge of this was calculated to give additional confidence to his companions: evidence of any of these circumstances will be sufficient proof of the allegation that he was present, aiding and abetting. On the other hand, although a man be present *whilst a felony is com- [397] mitting, yet if he take no part in it, and do not act in concert with those who commit it, he shall not be made liable as principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon. 1 Hale, 439. Fost. 350.

Where several persons assemble for a *lawful* purpose, and one of them, in the prosecution of it, kill a man, this is murder, or manslaughter, according to circumstances, in the party killing, and in all those who actually aided and abetted him in the act; but the other persons who were present, and who did not actually aid or abet, are not guilty as principals in the second degree. Fost. 354, 350. If, however, the object of the assembly were *unlawful*, or intended to be carried into effect by unlawful means, see Fost. 351, 352, particularly if intended to be carried into effect notwithstanding any opposition that might be offered against it, Fost. 353. 504, it will be murder in all who were present, whether they actually aided and abetted, or not, see the Sissinghurst-house case, 1 Hale, 461, provided the death were caused by the act of some one of the party, in the course of his endeavours to effect the common object of the assembly. 1 Hawk. c. 31. s. 52. Fost. 352. R. *v.* Hodgson & al., 1 Leach, 6. R. *v.* Plummer, Kel. 109.

In the case of murder by duelling, in strictness both of the seconds are guilty as principals in the second degree; yet Lord Hale considers that, as far as relates to the second of the party killed, the rule of law in this respect has been too far strained; and he seems to doubt whether such

second should be deemed a principal in the second degree. 1 Hale, 442. 452.

Indictment of an Accessary before the fact, together with the Principal.

After charging the principal with the offence, and immediately before the conclusion of the indictment, charge the accessary thus: And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, before the said [felony and larceny] was committed in form aforesaid, to wit, on the first day of May, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said J. S., the said [felony and larceny] in manner and form aforesaid to do and commit: against the peace, &c. &c. The act of accessary before the fact, is described in several statutes creating new felonies, or taking away the benefit of clergy from the principals and accessaries in felonies at common law, in different terms. In prudence, perhaps, it will be better to pursue the words of the statute upon which the indictment is framed, in describing the offence of the accessary in it; but if the statute do not mention accessaries, or
[398] *in the case of a felony at common law, the words in the above form, "incite, move, procure," &c. will be sufficiently indicative of the offence, and even where the statute does not expressly describe the offence of accessary in terms, it is not absolutely necessary to describe it in the same terms in the indictment; a description in equivalent terms will be sufficient; thus, where the words in the statute were "command, hire, or counsel," and in the indictment, "excite, move, and procure," the indictment was holden good; because the words were of the same legal import. R. *v.* Grevil, 1 And. 195. A man may be indicted as accessary to one of several principals, or to all; and if he be indicted as accessary to all, he may be convicted on such indictment as accessary to one or some of them. Lord Sanchar's case, 9 Co. 114. Fost. 361. 1 Hale, 624.

The offence of accessary before the fact, is punishable as a felony within clergy, unless the benefit of clergy be expressly taken away by statute. The offence of accessary, also, can never be greater than that of the principal: as, for instance, if a wife counsel or procure a stranger to murder her husband, as the stranger will be guilty of murder only, the wife is merely accessary to a murder: and on the other hand, if a stranger counsel a wife to kill her husband, he is accessary to petit treason. 1 Hawk. c. 32. s. 7, 8.

It may be necessary to observe, that it is only in petit treason and felonies, there can be accessaries; in high treason, every instance of incitement, &c., which in felony would make a man an accessary before the fact, will make him a principal traitor, Fost. 341, and he must be indicted as such. 1 Hale, 238. Also, all those who in felony would be accessaries before the fact, in offences under felony are principals, and must be indicted as such. In manslaughter, however, there can be no accessaries before the fact, for the offence is sudden and unpremeditated; and therefore if A. be indicted for murder, and B. as accessary, if the jury find A. guilty of manslaughter, they must acquit B. 1 Hale, 437. 450.

As no man can be an accessary to an offence, unless the offence be committed, it follows that the accessary must in all cases be tried after the conviction, (1 A. st. 2. c. 9,) or outlawry of the principal; or, at least, must be tried with the principal, in order that the guilt of the principal

may be established before the accessary is found guilty. Fost. 360. 1 Hale, 623. And even in high treason, the accessary (if he may be so termed) unless he can be indicted for compassing the King's death, must be tried either with the principal, or after the principal's attainder; 1 Hale, 625; and the same in offences under felony. Where the principal and accessary are tried together, (which is in general the best and most usual way,) if the principal plead otherwise than the general issue, the accessary shall not be bound to answer, until the principal's plea be first determined. 9 H. 7. 19. 1 Hale, 614. 2 Inst. 184. But if the general issue be pleaded, then the jury shall be charged * to enquire first of the principal, and if they find him not guilty, then to acquit the accessary; but if they find the principal guilty they are then to enquire of the accessary. 1 Hale, 624. 2 Inst. 184. Even in a case, where the principal was indicted for burglary and larceny in a dwelling house, and the accessary charged in the same indictment as accessary before the fact to the said "felony and burglary," and the jury acquitted the principal of the burglary, but found him guilty of the larceny: it seems the judges were of opinion that the accessary should have been acquitted; for the indictment charged him as accessary to the burglary only, and the principal being acquitted of that, the accessary should be acquitted also. R. *v.* Donally & Vaughan, 1 Russel, 40. The accessary, however, may waive this privilege of being tried with or after his principal; but even if he do, and be convicted, judgment must be respited until after the conviction of the principal. 1 Hale, 623. 2 Id. 224. [399]

It may be necessary to observe, that if a man be accessary to several, and be indicted as accessary to some of them, and be acquitted, he shall not afterwards be indicted as accessary to the others. 43 G. 3. c. 113. s. 5.

Evidence.

The prosecutor, after proving the guilt of J. S., must prove that J. W. had previously procured, hired, advised, or commanded J. S. to commit the larceny; and whether this were done directly, or through the intervention of a third person, is immaterial. Fost. 125.

As it is essential to constitute the offence of accessary, that the party should be absent at the time the offence was committed, 1 Hale, 615, 616, if it appear, therefore, that J. W. was present when the larceny in question was committed, he must be acquitted, R. *v.* Gordon, 1 Leach, 515, for the minor offence of accessary is merged in the greater one of principal.

The accessary, on the other hand, may controvert the guilt of his principal. Fost. 365. So, he may prove that after he had so ordered, hired, or advised J. S., he repented of it, and actually countermanded the order, &c. 1 Hale, 617. So, if it appear that the accessary ordered or advised one crime, and that the principal committed another; as for instance if he commanded J. S. to burn a house, and instead of doing so he committed a larceny, he must be acquitted. 1 Hale, 617. So, if J. W. ordered J. S. to commit a crime against A, and instead of doing so, he wilfully committed the same crime against B., J. W. would not be answerable as accessary: but if J. S. had committed the offence against B. by mistake, instead of A., it *seems it would be otherwise. Fost. 370, et seq.; but see 1 Hale, 617. 3 Inst. 51. But it is clear that the accessary is liable for all that ensues upon the execution of the unlawful act commanded: as for instance, if A. command B. to beat C., and [400]

he beat him so that he dies, A. is accessary to the murder. 4 Bl. Com. 37. 1 Hale, 617. Or if A. command B. to burn the house of C. and in doing so the house of D. is also burnt, A. is accessary to the burning of D.'s house. Plowd. 475. So, if the offence commanded be effected, although by different means from those commanded,—as for instance, if J. W. hire J. S. to poison A., and instead of poisoning him he shoot him,—J. W. is nevertheless liable as accessary. Fost. 369, 370.

Indictment against an Accessary before the fact, the Principal being Convicted.

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that heretofore, to wit, [at the general sessions of the delivery of the jail of, &c. &c.—so continuing the caption of the indictment against the principal,—it was presented that one J. S. late of, &c.—continuing the indictment to the end; reciting it however in the past, and not in the present tense:] upon which said indictment the said J. S., at the sessions of the jail delivery aforesaid, was duly convicted of the [felony and larceny] aforesaid: as by the record thereof more fully and at large appears *. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W. late of the parish aforesaid, in the county aforesaid, labourer, before the said [felony and larceny] was committed in form aforesaid, to wit, on the first day of May, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, and counsel, hire and command the said J. S., the said [felony and larceny] in manner and form aforesaid, to do and commit: against the peace, &c. as in ordinary cases. The venue may be laid in the county where the offence of accessary was committed, 2 and 3 Ed. 6. c. 24, or in that in which the principal felony was committed. See 43 G. 3. c. 113. s. 5.

Evidence.

1. The prosecutor must prove the conviction of the principal. Where the accessary is tried in the same county in which the principal was convicted, this is easily effected, by the clerk of assize or clerk of the peace attending at the trial, with the record. But if the accessary be tried in a different county, then, by stat. 2 and 3 Ed. 6. c. 24, after indictment found, the justices of jail delivery or oyer and terminer, shall write to the *custos rotulorum*, or person who has the custody of
[401] *the record, to ascertain if the principal be convicted, &c. or not; and if he certify under his seal that he is convicted, &c. then the justices shall proceed against the accessary, in the county in which he became accessary. Still however this certificate is not made evidence by the statute; and therefore it is necessary to produce either the record itself, or at least an examined copy of it. See ante, p. 80, 81.

But although the record of conviction is evidence of the guilt of the principal, yet it is not such conclusive evidence as to preclude the accessary from proving the principal's innocence, if he can. Fost. 365—368. R. *v.* Smith, 1 Leach, 288.

2. Having proved the guilt of the principal, prove the accessary's guilt, as directed, ante, p. 398.

Indictment against an Accessary after the fact, with the Principal.

After stating the offence of the principal, and immediately before the conclusion of the indictment, charge the accessary after the fact, thus:] And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W. late of the parish aforesaid, in the county aforesaid, labourer, well knowing the said J. S. to have done and committed the said [felony and larceny] in form aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. S. did feloniously receive, harbour, and maintain: against the peace, &c. as in ordinary cases. As to receiving stolen goods, &c. see ante, p. 153—156.

Although in high treason there are no accessaries after the fact, those who in felony would be accessaries after the fact, being principals in high treason; yet in their progress to conviction, they must be treated as accessaries, and indicted specially for the receipt, &c. and not as principal traitors. 1 Hale, 238. In offences under felony, there is no penalty inflicted by the common law for receiving, harbouring, or maintaining the principal; 1 Hale, 613; but in some few cases, it is made punishable by statute. Even in cases of petit larceny, the accessary after the fact is not punishable as such. Id. 618. Yet in these cases, if the act of the receiver amount to a rescue, or to the obstructing an officer of justice in the execution of his duty, or the like, he would undoubtedly be indictable for it as for a misdemeanor. 2 Hawk. c. 29. § 4, see ante, p. 305. 308, 309. In felonies at common law, the offence of accessary is a felony within clergy; and he is not ousted of clergy by a statute taking away clergy from the principal, unless the statute in terms extend to receivers also. In felonies created by statute,—if the statute makes no mention of accessaries, accessaries after the fact are punishable as for a felony within clergy; see 3 Inst. 59;—if it mention accessaries before the fact, but not accessaries after, the latter, *according [402] to lord Hale, (1 Hale, 235, 236. 328,) are not punishable; Hawkins, however, is of a different opinion, 2 Hawk. c. 29. s. 14; but if it mention receivers, &c. they are in that case punishable in the manner directed by the statute.

Accessaries after the fact cannot be tried before the conviction or attainder of their principal, unless they consent to it. 1 Hale, 623. 2 Hawk. c. 29. s. 45. But they may be tried with their principal, 1 Hale, 623; or separately, after the principal has been convicted or attainted. See ante, p. 398.

Evidence.

1. The prosecutor must prove the principal guilty of the felony charged against him by the indictment, as in ordinary cases.

2. He must prove that J. W. received, harboured, or maintained the principal, after he had so committed the felony. As, for instance, that he concealed him in his house, Dalt. 530, 531, or shut the door against his pursuers, until he should have an opportunity of escaping, 1 Hale, 619, or took money from him to allow him to escape, 9 H. 4. 1, or supplied him with money, a horse, or other necessaries, in order to enable him to escape, Hale, Sum. 218. 2 Hawk. c. 29. s. 26, or that the principal was in prison, and J. W. bribed the jailer to let him escape, or conveyed instruments to him to enable him to break prison and escape. 1 Hale, 621.

But merely suffering the principal to escape, will not make the party an accessary after the fact; for it amounts at most but to a mere omission. 9 H. 4. 1. 1 Hale, 619. So, if a person supply a felon in prison with victuals or other necessaries for his sustenance, 1 Hale, 620; or if a physician or surgeon professionally attend a felon sick or wounded, although he know him to be a felon, 1 Hale, 332, or if a person speak or write in order to obtain a felon's pardon or deliverance, 26 Ass. 47, or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly, 3 Inst. 139. 1 Hale, 620, or even if he himself agree, for money, not to give evidence against the felon, Moor, 8, or know of the felony, and do not discover it: 1 Hale, 371. 618: none of these acts would be sufficient to make the party an accessary after the fact.

A wife, however, is not punishable as accessary, for receiving, &c. her husband, although she know him to have committed felony, 1 Hale, 48 621, for she is presumed to act under his coercion. But no other relation of persons can excuse the wilful receipt or assistance of felons: a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master. Id.

3. It must be proved that J. W., at the time he received or [403] *assisted the principal felon, knew that he had committed a felony. This knowledge may be proved, either from the defendant's admissions, or the like, or by evidence of circumstances from which the jury may fairly presume it. See ante, p. 78, 79, and see R. v. Burridge, 3 P. Wms. 439.

Indictment against an Accessary after the fact, the Principal being Convicted.

Proceed as in the precedent, ante, p. 400, *to the* * ; *and then thus :*] And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, well knowing the said J. S. to have done and committed the said [felony and larceny] aforesaid, after the same was so committed as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. S., did feloniously receive, harbour, and maintain: against the peace, &c. &c. as in ordinary cases. Prove the conviction of the principal, as directed ante, p. 400; and the guilt of the accessary, as directed, ante, p. 402.

Indictment for Soliciting a Person to Commit an Offence.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of May, in the third year of the reign of our sovereign lord George the Fourth, falsely, wickedly, and unlawfully did solicit and incite one J. W., a servant of one J. N., to take, embezzle, and steal a large quantity, to wit, one hundred pounds weight of cotton twist, of the value of ———, of the goods and chattels of his master, the said J. N.: to the great damage of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment, or both. R. v. Higgins, 2 East, 5.

Evidence.

Prove the soliciting or inciting, as alleged in the indictment. Prove it in the same manner as you would prove the offence of accessary before the fact, with the exception of proving the larceny or embezzlement committed: if it appear that J. W. actually committed the offence to which he was incited by J. S., J. S. must be acquitted; for the misdemeanor in that case would be merged in the felony. See R. *v.* Higgins, 2 East, 5.

INDEX.

A.

ABATEMENT, plea in, 47. In what cases, 47; for want of an addition, or for a wrong one, 9; for want of christian or surname, or for a wrong one, 9. Affidavit to verify it, 47. Judgment, 48.
Abettors. See "*Aiders.*"
Abortion. Indictment for administering drugs, &c. to procure abortion, the woman not being quick with child, 236; evidence, 236; punishment, 236. Indictment for the same, the woman being quick with child, 237; evidence, 237; punishment, 237.
Acceptance of a bill of exchange, forging and uttering, 197—199.
Accessary after the fact, who, 402. In what offences, 401. Must be tried with, or after the principal, 402. Indictment of, together with the principal, 401; evidence, 402; punishment, 402. Indictment of, the principal being convicted, 403. See "*Receivers.*"
Accessary before the fact, who, 398. In what offences, 398. Must be tried with, or after the principal, 398. Indictment of, together with the principal, 397; evidence, 399; punishment, 398. Indictment of, the principal being convicted, 400; venue, 400; evidence, 400.
Accessary in one county to a felony in another, venue in indictments, against, 6.
Accessary, a competent witness against his principal, 96.
Accomplice, a competent witness, 96; but his testimony requires confirmation, 96.
Acquittal of one defendant, to enable him to give evidence for a co-defendant, in what cases, 97.
Acts of state, how proved, 88. Acts of state of a foreign government, how proved, 86.
Addition of defendant, in an indictment or information, 7; of his estate and degree, 7, 8; of his mystery, 8; of the town, hamlet *or* place, *and* county where he resided, 8, 9. It must be given after the first name, and not after the *alias dictus*, 7.
Adhering to the King's enemies, what, 271, 272; who an enemy, 272, 273. Overt acts, 271, 272. Indictment, 270; evidence, 273.
Administration, how proved, 84.
Admiralty court, libel, answer, depositions, and sentence of, how proved, 84; in what cases evidence, 84.
Admissions. See "*Confessions.*"
Affidavit to verify a plea to the jurisdiction, 46; or a plea of misnomer, 47, or other plea in abatement, 47.
Affidavit, to ground an application for an information, 42.
Affidavit, how proved, and in what cases evidence, 83.
Affirmation of a Quaker or Moravian, not admissible in criminal cases, 103, 104. If false, it is punishable as perjury, 313.

Affray, indictment for, 337 ; evidence, 337 ; punishment, 337.
Aiders and abettors, indictment against, 395 ; evidence, 396. 65, 66 ; punishment, 395, 396.
Aiders and abettors, in forcible entry, 173 ; in high treason, 270.
Aiding prisoners to escape, 308, 309. Indictment for conveying files, &c to a prisoner, to enable him to escape, 308 ; evidence, 309 ; punishment, 308.
Alias Dictus, in what cases necessary, and how used, 7.
Allegations, unnecessary but relevant, must be proved, 19. 67.
Allegiance, indictment for endeavouring to seduce a soldier or sailor from, 298 ; venue, 298 ; evidence, 299 ; punishment, 298.
Almanac, how proved, and in what cases evidence, 89.
Ammunition. See "*Stores.*"
Animals, in what cases larceny may be committed of them, 116.
Answer, in the court of Admiralty, how proved, 84 ; in the ecclesiastical courts, how proved, 84 ; in courts of equity, how proved, 82, 83.
Armour. See "*Stores.*"
Arrest, under a warrant, 255 ; without warrant, 255, 256 ; under other authority, 257.
Arrest after an escape, 256, 257.
Arrest for a contempt, 256.
Arrest, privilege of witnesses from, 107.
Arson, 177—182. See "*Burning.*" Indictment for burning the house of another, 177 ; evidence, 178—180. 67 ; punishment, 178. Indictment for burning the party's own house, 181 ; evidence, 182 ; punishment, 181 ; Burning outhouses, 178, 179, 181.
Articles of war, how proved, 89.
Artificers, indictment for enticing them to leave the kingdom, 355 ; evidence, 356 ; punishment, 355.
Assault, 241—253; what, 241, 242. Indictment for a common assault, 241 ; evidence for the prosecution, 241, 242 ; evidence for the defendant, 242—244 ; punishment, 241. Indictment for an aggravated assault, 245. Indictment for assaulting a woman quick with child, 245. Indictment for an assault with intent to murder, 245. Indictment for an assault on account of money won at play, 250 ; evidence, 251 ; punishment, 251 ; Indictment for assaulting a constable in the execution of his office, 251 ; evidence, 251. Indictment for assaulting a gamekeeper in the execution of his duty, 251. Indictment for assaulting a collector of a turnpike in the execution of his duty, 252. Indictment for an assault with intent to spoil the clothes of another, 252 ; evidence, 253 ; punishment, 252. Indictment for an assault with intent to commit a rape, 261 ; evidence, 261 ; punishment, 261. Indictment for an assault, with intent carnally to know a child under ten years of age, 261 ; evidence, 262 ; punishment, 261. Indictment for an assault with intent to commit sodomy, 263 ; evidence, 263 ; punishment, 263.
Assignment of perjury, 315.
Assisters. See "*Aiders.*"
Attachment against a witness for non-attendance, 107.
Attempts to commit crimes. Indictment for an attempt to poison, 238 ; evidence, 238 ; punishment, 238. Indictment for an attempt to rob, 148 ; evidence, 149 ; punishment, 149. Indictment for an attempt to commit a rape, 261 ; evidence, 261 ; punishment, 261. Indictment for an attempt carnally to know a child under ten years of age, 261 ; evidence, 262 ; punishment 261. Indictment for an attempt

to commit sodomy, 263; evidence, 263; punishment, 263. Indictment for attempting to bribe a constable, 322; evidence, 323; punishment, 323.
Attorney, privileged from giving evidence against his client, in what cases, 98.
Auterfois acquit, plea of, 51. In what cases, 51. Form of it, 52. Replication to it, 53. Evidence necessary to support it, 54. In felony and treason, the defendant must also plead over, 53.
Auterfois attaint, plea of, 54. In what cases, 54. In what form, 55.
Auterfois convict, plea of, 54. In what cases, 54. In what form, 54.
Averments, how made, 27. In indictments for libel, in what cases necessary, 288.

B.

Bailee, larceny by, in what cases, 124, 126. Larceny from, how stated, 10; and proved, 117, 118.
Bank of England, embezzlement by clerks of, 157.
Bank notes, forgery of. Indictment for forging a bank note, 200; evidence, 201; punishment, 201. Indictment for having a forged bank note in his possession, 201; evidence, 202; punishment, 202.
Bank notes, stealing, 116. 130. Indictment for, 130. 19; evidence, 131.
Bank of a river, or sea banks, indictment for cutting down, 185; evidence, 185; punishment, 185.
Banker's draft, See "*Cheque.*" "*Embezzlement.*"
Bankrupt, proceedings on commissions of, how proved, 85.
Baptism, how proved, 87; certificate of, 87.
Barge. See "*Ship.*"
Barn. See "*Outhouse.*" "*Riot.*"
Barrister, privileged from giving evidence against his client, in what cases, 98.
Bastard. Indictment against a woman for the murder of her bastard child, 234; evidence, 235, 236. Concealment of the birth of a bastard by its mother, punishment, 235; evidence to negative it, 236.
Battery. See "*Assault.*" Battery, *se defendendo*, 243; in defence of the party's possession, 244; in the execution of process, &c. 244.
Bawdy house, indictment for keeping, 362; evidence, 362, 363; punishment, 362.
Beans, stealing or destroying, 115.
Beating, indictment for murder by, 230.
Bell metal, stealing, 115, 130.
Benefit of clergy, indictment on statute taking away, how framed, 66, 67.
Bestiality, indictment for, 262; evidence, 263; punishment, 263.
Bible, entry in, in what cases evidence, 87.
Bigamy, indictment for, 357; venue, 3. 358; evidence on the part of the prosecution, 358, 359; evidence for the defendant, 359, 360; punishment, 358.
Bill in equity, how proved, 82.
Bill of exchange. See "*Embezzlement.*" Indictment for forging and uttering a bill of exchange, 197; evidence, 199; punishment, 199. Indictment for stealing a bill of exchange, 130. 116. 19; evidence, 131.
Birth, how proved, 87.
Bishop, certificate of, in what cases evidence, 87.
Black lead, or black lead ore, stealing from mines, 115.

Blasphemous libel, indictment for, 294 ; evidence, 295 ; punishment, 294.
Bleaching grounds, indictment for stealing linen, cotton, &c. from, 141 ; evidence, 142 ; punishment, 142.
Boat. See "*Ship.*"
Bond. See "*Embezzlement.*" Indictment for forging and uttering a bond, 195 ; evidence, 196 ; punishment, 196. Indictment for stealing a bond, 130. 116 ; evidence, 131.
Books of corporations and public companies, entries in, how proved, 88. Poll books of an election, how proved, 87. Prison books, in what cases evidence, 87.
Brass, stealing, 115. 130.
Breach of prison, indictment for, 306 ; evidence, 307, 308 ; punishment, 307. Indictment for conveying files, &c. to a prisoner, to enable him to break prison, 308 ; evidence, 309 ; punishment, 308.
Breaking, what, in burglary, 169 ; actual, 169 ; constructive, 169, 170.
Bribery, 322. Indictment for attempting to bribe a constable, 322 ; evidence, 323 ; punishment, 323.
Bridge, indictment for not repairing, 374, 375 ; pleas and evidence, 376. Larceny of the materials or tools provided for the repair of, how described, 119.
British Colonies, judgments of the courts in, how proved, 86.
Bullock. See "*Cattle.*"
Burglary, 164—173. Indictment for burglary and larceny, 164 ; evidence, 164—172 ; punishment, 164. Indictment for burglary, in breaking out of a house, 172 ; evidence, 173 ; punishment, 173.
Burglary in a church, 169.
Burglary in the apartments of a lodger, how laid, 168 ; in the room of a guest at an inn, how laid, 168.
Burglariously, necessary in indictments for burglary, 23.
Burial, how proved, 87 ; certificate of, 87.
Burning. See "*Arson.*" Burning or setting fire to mills, 180, 181, corn, straw, hay, wood, 178, 181, woods, underwood, or coppice, 181, mine, pit, or delph of coal, 181, wain or cart laden with coals or merchandise, 181, vessels of war in the dock yards, 181, or beyond seas, 4, the king's stores, timber, or ammunition of war, or the places where the same are kept, 181. 4, ships, keels, or other vessels, 181, and see 187, buildings or engines, &c. used in manufactures, &c. 181.
Burning in the hand, and the punishment substituted for it, their effect in restoring competency, 95.

C.

Cabbages, stealing, 115.
Calf. See "*Cattle.*"
Caption of an indictment, 6 ; form of it, 6.
Cards. See "*Gaming.*"
Carnal knowledge, how proved, 260.
Carnally knowing and abusing a female under the age of ten years, indictment for, 260 ; evidence, 261 ; punishment, 261. Indictment for an attempt to do so, 261 ; evidence, 262 ; punishment, 261.
Carrots, stealing or destroying, 115.
Carrying away, what, necessary to constitute larceny, 127.
Cart or wain laden with coals or merchandise, setting fire to or burning, 181.

Catholics, disturbing the public worship of, 382.
Cattle. Indictment for maliciously killing cattle, 182; evidence, 182; punishment, 182. Indictment for maliciously wounding cattle, 183; evidence, 183; punishment, 183. Indictment for killing cattle or sheep, with intent to steal part of the carcass, 128; evidence, 129; punishment, 129. Indictment for stealing cattle or sheep, 128; evidence, 128; punishment, 128.
Cautions to be observed in admitting presumptive or circumstantial evidence, 78.
Certainty required in an indictment, &c. 16—18; certainty as to the party indicted, 7; certainty as to the person against whom the offence was committed, 9; certainty as to time and place, 11; certainty as to the facts, circumstances, and intent, constituting the offence, 15. Certainty to a certain intent in every particular, what, and in what cases requisite, 17; certainty to a common intent, what, and in what cases requisite, 17; certainty to a certain intent in general, what, and in what cases requisite, 17, 18.
Certainty required in stating matter of inducement, 18.
Certainty required in an indictment for perjury, 18.
Certainty required in indictments on statutes ousting clergy, 23; and on statutes creating offences, 23.
Certificates of bishops, in what cases evidence, 87; of consuls abroad, not evidence, 88; of the judges in Wales, in what cases evidence, 88; of magistrates, as to a road being in repair, 88.
Certificates of baptism, 87; of burial, 87; of marriage, 87.
Challenge to fight, indictment for sending, 337; evidence, 338; punishment, 338. Indictment for provoking a man to send a challenge, 338, 339; evidence, 339; punishment, 339. Indictment for challenging to fight, on account of money won at play, 339; evidence, 339; punishment, 339.
Chapel, riotously beginning to pull down or destroy, 336. See "*Riot.*" Larceny from a chapel. See "*Sacrilege.*"
Character, evidence as to, 70. Evidence as to the character of a witness, 101.
Cheating, 158—164. Indictment for obtaining goods by false pretences, 158, 159; what false pretences within the statute, 159, 160; evidence, 160, 161; punishment, 159. Obtaining money by assuming the name of another, 160. Indictment for obtaining money by means of a counterfeit letter, or privy token, 161; evidence, 162; punishment, 162. Indictment for selling by false scales, 162, 163; evidence, 163, 164; punishment, 163. Selling by false weights or measures, 163.
Cheque upon a banker, indictment for forging, 203; evidence, 203, 204; punishment, 203. Larceny of, 116. 130. Embezzlement of, 156—158. Cheque upon a banker with whom the drawer has no account, obtaining money, &c. upon, how punishable, 160. 204.
Child may be a witness for or against his parent, 98; may justify a battery, 243, or even homicide, 219, in defence of his parent.
Child-stealing, indictment for, 257; evidence, 258; punishment, 258.
Choses in action, not the subject of larceny at common law, 116; how far altered by statute, 116.
Christening, how proved, 87.
Christian name of defendant, in an indictment or information, 7.
Church, riotously beginning to pull down or destroy, 336. See "*Riot.*" Larceny from a church, see "*Sacrilege.*"

Circumstantial evidence, 77, 78. Cautions to be observed in receiving it, 78.
Clergy, benefit of, indictment on a statute taking away, 23. 66, 67.
Clergy, benefit of, granted to a felon, its effect in restoring his competency as a witness, 95.
Clergy, counterplea of, 57; in what cases, 58; form of it, 58; evidence to support it, 59.
Clerks, embezzlement by, 156. See "*Embezzlement.*"
Cloth, stealing, from the tenters or rack, indictment for, 142; evidence, 143; punishment, 143.
Clothes, assault with intent to spoil, indictment for, 252; evidence, 253; punishment, 252.
Coach house, privately stealing from, 136, 137.
Coal, mine, pit or delph of, setting fire to or burning, 181.
Coin of the realm, offences relating to the, 275—285. Indictment for counterfeiting the king's money, 275; evidence, 276; punishment, 275. Indictment for counterfeiting copper money, 277; evidence, 277; punishment, 277. Indictment for clipping, rounding, and filing the current coin, 277; evidence, 278; punishment, 278. Indictment for uttering counterfeit money, 278; evidence, 278. 69. 78; punishment, 278. Indictment for a subsequent uttering, 279; evidence, 279; punishment, 279. Indictment for uttering twice in ten days, 280; evidence, 280; punishment 280. Indictment, for uttering counterfeit money, having other counterfeit money at the same time in his possession, 280; evidence, 281; punishment, 281. Indictment for putting off counterfeit money at a lower rate than by its denomination it imports, 281; evidence, 281, 282; punishment, 281. Indictment for the like as to copper money, 282; punishment, 282. Indictment for having coining tools in his possession, 283; evidence, 283; punishment, 283. Indictment for concealing such tools, 284; evidence, 284; punishment, 284.
Coin, foreign, offences relating to, 284.
Coining tools, indictment for having in his possession, 283; evidence, 283; punishment, 283. Indictment for concealing such tools, 284; evidence, 284; punishment, 284.
Colliery, engines, &c. belonging to, riotously beginning to destroy, 336. See "*Riot.*"
Colonies, British, judgments in the courts of, how proved, 86.
Combinations by workmen, 394.
Commencement of an indictment, 2; of a second count, 31; of an information *ex officio*, 37; of an information by the master of the crown office, 42; of special pleas, 46, 47. 50; of replication, 50. 46, 47; of rejoinder, 51.
Commission of an offence, how far it detracts from the credit of a witness, 100, 101.
Common recovery, how proved, 82.
Common nuisance. See "*Nuisance.*"
Companies, public, entries in the books of, how proved, 88.
Comparison of handwriting, in what cases evidence, 91.
Compassing the King's death. See "*Treason.*"
Competency. See "*Incompetency.*"
Compounding felony, indictment for, 328; evidence, 329; punishment, 328.
Concealing the birth of a bastard child by its mother, punishment, 235; evidence to negative it, 236.

Concealing coining tools, indictment for, 284; evidence, 284; punishment, 284.
Conclusion of an indictment, 27, 28; of an information *ex officio*, 38; of an information by the master of the crown office, 43; of special pleas, 50. 46, 47; of replication, 50; of rejoinder, 51.
Confessions, in what cases evidence, 73; when made in open court, 73; where the defendant submits to a fine, 74; upon an examination before magistrates, 74; or to any other person, 74. They must be voluntary, 74; if made through promises of favour, &c. they shall not be received in evidence, 74, although facts arising from them may, 75. How proved, 75. They must be taken all together, 76. They are evidence only against the party who made them, and not against his accomplices, 76.
Conies, indictment for killing or stealing, 133; evidence, 133; punishment, 133. 116.
Conspiracy, what, 390. Indictment, generally, 390, 391. Venue, 5. Evidence, generally, 66. 68. 268. Indictment for a conspiracy to charge a man with a crime, 388; evidence, 392; punishment, 390. Indictment for a conspiracy to commit a crime, 392; evidence, 394; punishment, 390.
Constable. See "*Officer.*" Indictment for refusing to serve the office of chief constable, 383; evidence, 384; punishment, 384. Indictment for refusing to serve the office of petty constable, 385.
Consul, certificate of, not evidence, 88.
Contempt, arrest for, a justification for imprisonment, 256.
Contents of a deed, how proved, 89.
Conviction, in what cases it renders the party incompetent as a witness, 94.
Convictions by magistrates, how proved, 82.
Copper, attached to a building, &c. stealing, 130. 115.
Copper money. See "*Coin.*"
Coppice, setting fire to or burning, 181.
Copy or exemplification of a record, in what cases evidence, 79. 71.
Corn, setting fire to or burning, 181. 178. Cutting down and taking away corn growing, 115.
Corporation, larceny of the property of, how described, 118.
Corporation books, entries in, how proved, 88. Inspection of in what cases granted, 88.
Correction, in what cases a justification for a battery, 243. Killing by, 221; in what cases murder, 221; in what cases manslaughter, 221; in what cases misadventure only, 221.
Costs, upon an information, 43.
Cotton goods or yarn, stealing, 141, 142.
Counsel, privileged from giving evidence against his client, in what cases, 98.
Counts cannot be struck out of an indictment, 31.
Counterfeiting. See "*Coin.*" Counterfeiting the great or privy seal, 275.
Counterfeit letter, obtaining money by means of, indictment for, 161; evidence, 162; punishment, 162.
Counterplea of clergy, 57; in what cases, 58; form of it, 58. Evidence necessary to support it, 58.
County court, judgments of, how proved, 84.
Court baron, judgments of, how proved, 84.
Courts of the British Colonies, judgments of, how proved, 86.

Courts, foreign, judgments of, how proved, 86.
Courts, inferior, judgments of, how proved, 84.
Courts, superior, judgments of. See "*Evidence.*" "*Record.*"
Court rolls of a manor, how proved, 85.
Cow. See "*Cattle.*"
Credit of witnesses, in what it consists, and how ascertained, 99—104.
Cross examination of witnesses, 110.

D.

Day, what, in an indictment for housebreaking, 139.
Dead bodies, indictment for taking up, 380; evidence, 380; punishment, 380.
Deaf and dumb person, may be a witness, 94.
Death, how proved, 87; in what cases presumed, in bigamy, 359, 360.
Declarations of a dying person, when received in evidence, 73.
Declinatory pleas, what, and in what cases, 57.
Decree in equity, how proved, 83.
Deed, its contents, how proved, 89; execution of it, how proved, 89.
Deed enrolled, how proved, 82.
Deer, stealing, 116. 132. Indictment for, 132; evidence, 132; punishment, 132.
Deer park, indictment for being in, armed and disguised, 133; venue, 133; evidence, 133; punishment, 133.
Defence, matter of, how proved, 67.
Defence. See "*Self Defence.*" A battery, 243, or even homicide, 219, may be excused by a parent in defence of his child, a husband in defence of his wife, a servant in defence of his master, or *vice versa.* Killing in defence of property, &c. 221; in what cases justifiable, 221, 222: in what not, 222. Battery in defence of one's possession, 244.
Defendant, in what cases acquitted, to enable him to give evidence for a co-defendant, 97.
Demurrer, 55; seldom occurs in practice, 55, 56. Form of a demurrer to an indictment or information, 56; joinder, 56. Form of demurrer to a plea in bar, 56; joinder, 57.
Depositions: in the admiralty court, how proved, 84; in the ecclesiastical courts, how proved, 84; in courts of equity, how proved, 83.
Depositions upon oath before a magistrate, how proved, and in what cases evidence, 85; how taken, 85.
Detainer, forcible, indictment for, 175; evidence, 176.
Devise of lands, how proved, 91.
Dice. See "*Gaming.*"
Diploma, not evidence, 88.
Disobeying the orders of a magistrate, 327. Indictment against a high constable, for disobeying an order of sessions, 327; evidence, 328.
Dissenters, protestant, disturbing the public worship of, 381, 382.
Disturbing public worship, 381. Indictment for disturbing a congregation of baptists during divine service, 381; evidence, 382; punishment, 382.
Dividend warrant, forging or uttering, 200, 201; stealing, 116. 130, 131.
Dog, stealing, 116.
Domesday book, how proved, 87.
Draft on a banker. See "*Cheque.*"
Drowning, indictment for murder by, 232.

Drying house, stealing linen, cotton, yarn, &c., from, 141, 142.
Duel, killing in, murder, 217.
Dumb and deaf person, may be a witness, 94.
Duplicity in indictments, 25; how to be taken advantage of, 25.
Dwelling house. See "*House.*" Indictment for stealing from, 135; see 138; evidence, 135, 136; punishment, 135. Indictment for stealing from, some person being therein, and put in fear, 136; evidence, 136; punishment, 136. Indictment for stealing from, no person being therein, 138; evidence, 139; punishment, 138.
Dwelling house, what, in burglary, 165; ownership of it, in whom, and how stated, 166, 167, 168.
Dwelling house, what, in arson, 179.
Dying declarations, when received in evidence, 73.

E.

East India bonds, stealing, 116. 130, 131.
Ecclesiastical courts, libels, answer, depositions, and sentence in, how proved, 84; practice of, how proved, 84.
Effectum, does not imply a literal copy, 20, 21. 64, 65.
Embezzlement of money, goods, bonds, bills of exchange, notes, bankers' drafts, and other valuable effects and securities, by clerks, &c., indictment for, 156; venue, 5, 6; evidence, 157, 158; punishment, 157.
Embezzlement by servants, 157; by officers or servants of the bank of England, 157; by bankers and others, of securities lodged in their hands, 157; of letters, &c. by servants in the post office, 157. 116; of money issued for the public service, 157.
Embezzling the king's stores, indictment for, 299; evidence, 300; punishment, 299.
Enemy. See "*Adhering.*" "*Treason.*"
Engrossing, what, 355. Indictment for, 354; evidence, 354; punishment, 355.
Enticing artificers to leave the kingdom, indictment for, 355; evidence, 356; punishment, 355.
Entry, what, in burglary, 170.
Entry, forcible, into a freehold, indictment for, 173; evidence, 174, 175; punishment, 174. Into a leasehold, &c. 175. Indictment for the same, at common law, 176; evidence, 177.
Equity, bill, answer, depositions, and decree in court of, how proved, 82, 83.
Escape, 303. Indictment against a constable for a negligent escape, 303; evidence, 304, 305; punishment, 304. Indictment for escaping out of the custody of a constable, 305; punishment; 305; Indictment against a jailer for a voluntary escape, 305; evidence, 305; punishment, 306. Aiding a prisoner to escape, 308, 309. Indictment for conveying files, &c. to a prisoner, to enable him to escape, 308; evidence, 309; punishment, 308.
Evidence, 60—112.
I. *What allegations must be proved*, 60. Time, 60. Place, 61. The offence charged, 62—67. Matter of defence, &c., 67. Matter not alleged, in what cases, 67—70.
II. *The manner of proving the matters put in issue*, 71.
1. *Admissions and confessions*, 73. In what cases, 73—75. How proved, 75, 76.
2. *Presumptions*, or circumstantial evidence, 77, 78.
3. *Written evidence*, 79—92.

—Records, 79 : public statutes, 79 ; private statutes, 79 ; records of the king's courts, 79—82 ; records of inferior courts, 80 ; writs, 81 ; judgments of the House of Lords, 82 ; convictions, 82 ; fines and recoveries, 82 ; deeds enrolled, 82 ; letters patent, 82.
—Matters *quasi* of record, 82 ; proceedings in parliament, 82 ; proceedings in courts of equity, 82, 83 ; proceedings in courts of law, not being records, 83, such as rules, 83 ; judge's orders, 83, affidavits, 83 ; proceedings in the ecclesiastical courts, 84, including probates of wills, 84, and letters of administration, 84 ; proceedings in the court of admiralty, 84 ; proceedings in inferior courts, 84, 85, such as the judgments of the county court, or court baron, 84, the court rolls of a manor, 85, proceedings on commissions of bankrupt, 85, judgments of the insolvent court, 85, and informations and depositions before magistrates, 85, 86 ; proceedings in foreign courts, 86 ; public surveys, inquisitions, &c., 87 ; registers, &c., 87 ; certificates, &c., 87, 88 ; ancient terriers, surveys, &c. 88 ; corporation books, and the books of public companies, 88 ; public acts of state, 88, 89.
—Written instruments of a private nature, 89 ; deeds, 89—91 ; wills, 91 ; other writings not under seal, 91. Handwriting, how proved, 91, 92.
4. *Parol evidence*, 92—112.
—In what cases receivable, 92, 93.
—Incompetency of witnesses, 93 ; from want of discretion, 93, 94 ; from want of religion, 94 ; from infamy, 94, 95 ; from interest, 95 ; from being parties of the suit, 97 ; from relation to the parties, 97—99.
—Credit of witnesses, 99 ; from their knowledge, 99 ; from their disinterestedness, 100 ; from their integrity, 101 ; from their veracity, 101—103 ; from their being sworn to speak the truth, 103, 104.
—The number of witnesses requisite, 104 ; at common law, 104 ; by statute, 104 ; upon an indictment for perjury, 104.
—Process against witnesses, 104 ; *subpœna*, 105 ; *subpœna duces tecum*, 106 ; habeas corpus ad testificandum, 106.
—Privilege of witnesses from arrest, 107.
—Penalty for nonattendance of witness, 107.
—Witnesses' expenses, 108.
—Examination of witnesses, 108 ; examination, 109 ; cross-examination, 110—112 ; re-examination, 112.
Evidence must tend directly to the proof or disproof of the matter in issue, 68—70. And the best possible evidence must be produced, 70.
Evidence, hearsay, 72.
Evidence, presumptive, what, 77. Violent presumptions, 77 ; probable presumptions, 77 ; light or rash presumptions, 77. Cautions to be observed in receiving this evidence, 78.
Evidence, secondary, 71.
Evidence, given upon a former trial, how proved, 81.
Examination of witnesses, 108—112.
Exception in a statute, when to be stated in pleading, 25 ; how proved, 66.
Exchequer bills, stealing, 116. 130, 131.
Exchequer orders or tallies, stealing, 116. 130, 131.
Excuse, matter of, may be given in evidence under the general issue, 49.
Excusable homicide, 214. 218.

Executing a criminal, in what cases justifiable, 229.
Execution of a deed, how proved, 89.
Ex officio, information. See "*Information.*"
Expenses of prosecutor, in what cases given to him, 108.
Expenses of witness, 108.
Express malice, 215, 216. See "*Murder.*"
Expulsion, when to be proved, upon an indictment for a forcible entry, 175.
Extortion, indictment against a constable for, 323; venue, 324; evidence, 324; punishment, 324.
Eye, putting out, with intent to maim or disfigure, 249.

F

False imprisonment, 253—257. Indictment for an assault and false imprisonment, 253; evidence for the prosecution, 254; evidence for the defendant, 254—257; punishment, 254.
False pretences, obtaining goods, &c., by, indictment for, 158, 159; what pretences within the statute, 159, 160; evidence, 62. 160, 161; punishment, 159.
False scales, indictment for selling by, 162, 163; evidence, 163, 164; punishment, 163.
False weights or measures, selling by, 163.
Farthing. See "*Coin.*"
Feloniously, requisite in indictments for felony, 22.
Felony, compounding, indictment for, 328; evidence, 329; punishment, 329.
Fences, breaking or cutting down, 115.
Fences of inclosed lands, burning, damaging or destroying, indictment for, 185; evidence, 186; punishment, 185.
Fighting, killing by, 216; where murder, 217; where manslaughter, 217; where homicide *se defendendo*, 218, 219. Homicide of or by a stranger interfering, 219.
Figures, when allowable in an indictment, 25.
Finding of an indictment, 33.
Finding. See "*Goods.*"
Fine, how proved, 82.
Fish, stealing, killing or destroying, indictment for, 134. 117; evidence, 135; punishment, 134.
Fish pond, breaking down the head of, indictment for, 184; evidence, 184, 185; punishment, 184.
Fleet books, not evidence of a marriage, 87.
Forcible entry, 173. Indictment for a forcible entry into a freehold, 173; evidence, 174, 175; punishment, 174. Indictment for a forcible entry into a leasehold, &c. 175. Indictment for a forcible detainer, 175; evidence, 176. Indictment for a forcible entry and detainer at common law, 176; evidence, 177.
Foreign coin, offences relating to, 284.
Foreign country, laws of, how proved, 86.
Foreign courts, judgments of, how proved, 86.
Foreign language, libel, &c. in, how set out, 288. 20; how proved, 291.
Forests, king's, stealing or barking, &c. trees in, 115.
Forestalling, what, 353. Indictment for, 353; evidence, 354; punishment, 353.
Forgery, 188—209. Indictment for forging and uttering, generally, 188—190; general evidence of the forgery, 190—194. 91, 92. 96; general evidence of the uttering, 194, 195. 69. 78. Indictment for

forging and uttering a bank note or dividend warrant, 200; evidence, 201; punishment, 201. Indictment for having a forged bank note in his possession, 201; evidence, 202; punishment, 202. Indictment for forging and uttering a banker's cheque, or order for the payment of money, 203; evidence, 203, 204; punishment, 203. Indictment for forging and uttering a bill of exchange, 197; evidence, 199; punishment, 199. Indictment for forging and uttering a bond, 195; evidence, 196; punishment, 196. Indictment for forging and uttering a receipt, 202; evidence, 203; punishment, 203. Indictment for forging and uttering a will, 196; evidence, 197. Indictment at common law, for forging and uttering a fieri facias, 204; evidence, 206; punishment, 206.

Fruit trees, pulling up or destroying, 115.

G.

Game. Indictment for going armed in the night, for the purpose of destroying game, 379; evidence, 379, 380; punishment, 379. See "*Conies.*" "*Deer.*" "*Hares.*"

Gaming, 377. Indictment for winning money at cards, &c., by fraud, 377; evidence, 378; punishment, 377. Indictment for winning more than 10*l.* at one sitting, 378; evidence, 378; punishment, 378. Indictment for an assault on account of money won at play, 250; evidence, 251; punishment, 251. Indictment for challenging to fight, on account of money won at play, 339; evidence, 339; punishment, 339.

Gaming house, indictment for keeping, 363; evidence, 364; punishment, 363.

Gamekeeper, indictment for assaulting, 251. Homicide by, 229.

Garden or orchard, robbing, 115.

Gazette, in what cases evidence, 88.

General issue, 48. Evidence which may be given under it, generally, 49. 60.

General traverse, puts the opposite party to prove the fact traversed, 60.

Goods, how described in an indictment, 23; variance between the statement and the evidence, in what cases material, 22. 63. 114. See "*Embezzlement.*" "*Larceny.*"

Goods found, larceny of, 120.

Grand jurors, who may be, 34.

Grand larceny, how punished, 114.

Great seal, counterfeiting, 275.

Guest at an inn, larceny by, 126. Burglary in the chamber of, how laid, 168.

Guilty knowledge, how proved, 69. 78. 195.

Guineas. See "*Coin.*"

H.

Habeas corpus ad testificandum, 106.

Habiliments of war. See "*Stores.*"

Halfpenny. See "*Coin.*"

Handwriting, how proved, 91, 92. Comparison of handwriting, in what cases evidence, 91.

Hares. Indictment for being in a preserve where hares are kept, armed and disguised, 134; evidence, 134; punishment, 134. Robbing such a preserve, 134. 117.

Hawks, stealing, 117.

Hay, setting fire to or burning, 181. 178.

Hearsay evidence, 72.
Hedges, breaking or cutting down, 115.
Heifer. See "*Cattle.*"
High seas, what, within the jurisdiction of the admiralty, 150. Offences on, venue in indictments for, 4.
High treason. See "*Treason.*"
Highway, indictment for obstructing, 364; evidence, 365; punishment, 365. Indictment against a parish for not repairing, 366; punishment, 366; general issue, 368; evidence for the prosecution under the general issue, 368, 369; evidence for the parish under the general issue, 369; plea that others *ratione tenuræ* are bound to repair, 369; replication thereto, 370; evidence to support the plea, 370; plea that a particular division of the parish is bound to repair, 371; replication thereto, 372; evidence to support the plea, 372. Indictment against an individual for not repairing *ratione tenuræ*, 373; general issue, 373; evidence, 373. Indictment against a particular district of a parish for not repairing, 374; general issue, 374; evidence, 374.
Homicide, excusable, 214. 218; justifiable, 213. See "*Killing.*"
Homicide *per infortunium*, or by misadventure, 214.
Homicide *se defendendo*, 214. 218, 219.
Horse. See "*Cattle.*"
Horse stealing, indictment for, 127; evidence, 128; punishment, 127.
House See "*Arson.*" "*Burglary.*" "*Dwelling-house.*" Indictment for riotously beginning to demolish a house, 336; evidence, 336; punishment, 337.
House breaking, indictment for, 138; evidence, 139; punishment, 138.
Husband cannot be a witness for his wife, 97; in what cases he may be witness against her, 97, 98. He may kill another, 219, or commit a battery, 243, in defence of his wife.

I.

Ideot, incapable of crime, 214; cannot be a witness, 93.
Implied malice, 216—229.
Imprisonment. See "*False Imprisonment.*"
Inciting to mutiny, 298.
Inciting to the commission of crime, 403.
Incompetency of witnesses, 93: from want of discretion, 93, 94; from want of religion, 94; from infamy, 94, 95; from interest, 95; from being parties to the suit, 97; from relation to the parties, 97—99. Objection for incompetency, when and how to be made, 110.
Indecency, public, 376, 377.
India bonds, stealing, 116. 130, 131.
Indictment, 1—36.
1. *What; and in what cases it lies*, 1: for offences at common law, 1; for offences by statute, 1, 2. In what cases it does not lie, 2.
2. *The form of it*, 2. The commencement, 2—6; venue, 3; caption, 6. The statement, 6—27; must be certain as to the party indicted, 7; must be certain as to the person against whom the offence was committed, 9; must be certain as to time and place, 11; must be certain as to the facts, circumstances, and intent, constituting the offence, 15; it must not be double, 25; it must be positive, 26; it must not be repugnant, 26; averments how made, 27. Conclusion of the indictment, 27; for an offence at common law, 27; for an offence by statute, 28, 29.
3. *Joinder of two or more defendants in one indictment*, 29.
4. *Joinder of several offences in one indictment*, 30.

5. *Within what time the bill must be preferred*, 32.
6. *How found*, 33.
7. *In what cases quashed*, 35. How, 36.
Indorsement of a bill of exchange, forging and uttering, 197.
Inducement, matter of, what certainty required in stating, 18.
Infamy, incompetency of witnesses, from, 94.
Infant, in what cases incapable of crime, 214.
Information, *ex officio*, 37. What, and in what cases it lies, 37. Form of it, 37. How filed, 38. In what cases quashed, 38.
Information by the master of the crown office, 38—44. What, 38. In what cases it lies, 39; against magistrates, 40; against ministerial officers, 40; in what cases the court generally refuse it, 40 When to be moved for, 42. Form of it, 42. How filed, 43. Recognisance to be entered into by prosecutor, 43. Costs, 43. In what cases quashed, 44.
Information and depositions upon oath before a magistrate, how proved, and in what cases evidence, 85. How taken, 85.
Inuendo, in what cases necessary, 288, 289. 315. Its effect, 288, 289. How proved. 291.
Inscription on a tomb stone, in what cases evidence, 87.
Insolvent debtors, judgment of the court of, how proved, 85.
Inspection of corporation and other public books, in what cases granted, 88.
Intent, how stated in an indictment, &c. 22. How proved, 65. 78. 119.
Intent in burglary, 171. How proved, 171.
Interest, incompetency of a witness from, 95. How far it detracts from his credit, 100.
Involuntary manslaughter, 214.
Ireland, records of the courts in, how proved, 86.
Iron attached to a building, &c. stealing, 115. 130.

J.

Jews, marriage of, how proved, 87.
Joinder of two or more defendants in one indictment, &c. 29.
Joinder of several offences in one indictment, 30. See "*Duplicity.*"
Joinder in demurrer. See "*Demurrer.*"
Joint tenant, by taking the thing in joint tenancy from his co-tenant, cannot be guilty of larceny, 120.
Journals of parliament, entries in, how proved, 82. In what cases evidence, 82.
Judge's order, how proved, 83.
Judgment. See "*Record.*" Judgment of the house of Lords, how proved, 82. Judgments of the county court, court baron, and other inferior courts, how proved, 84. Judgment of the court for insolvent debtors, how proved, 85. Judgments of courts in the British Colonies, how proved, 86. Judgments of foreign courts, how proved, 86.
Judgment upon a plea in abatement, 48.
Jurisdiction, plea to, 45. In what cases, 45. Form of it, 46. It must be verified by affidavit, 46. Form of a replication to it, 46.
Jurors. See "*Grand Jurors.*"
Justifiable homicide, 213.
Justification, matter of, may be given in evidence under the general issue, 49.
Justices of Peace. See "*Magistrates.*"

K.

Keel. See "*Ship.*"
Killing, what, to constitute murder, 214, 215. Killing by correction, 221;

where murder, 221; where manslaughter, 221; when misadventure only, 221. Killing in defence of wife, child, servant, &c. 219. Killing in defence of property, &c. 221; in what cases justifiable, 221, 222; in what not, 222. Killing in a duel, murder, 217. Killing by fighting, 216; where murder, 217; where manslaughter, 217; where homicide *se defendendo*, 218. 219. Killing of or by a stranger interfering, 219. Killing officers of justice, 225; where murder, 225—228; where manslaughter, 225—228. Killing by officers of justice, 228: where justifiable, 228; where manslaughter, 228; where murder, 228. Killing by poison, 216. 224. Killing upon provocation, 219; where murder, 219—221; where manslaughter, 219, 220; cannot be excused or justified, 219. Killing rioters, in what case justifiable, 229. Killing trespassers in chases, forests, parks, warrens, &c. in what cases justifiable, 229. Killing without intention, whilst doing another act, 222; where murder, 222—225; where manslaughter, 222—225; where misadventure, 222—225.

Killing cattle. Indictment for maliciously killing cattle, 182; evidence, 182; punishment, 182.

Killing or stealing conies, 133. 116. Indictment for killing sheep, or cattle, with intent to steal part of the carcass, 128, 129.

Killing or destroying fish, 134, 135. 117.

Knowledge. See "*Carnal Knowledge.*" Guilty knowledge, how proved, 69. 78. 195.

L.

Lace, stealing, from bleaching grounds, &c. 141, 142.

Land and things attached or adhering to it, not the subject of larceny at common law, 115. How far altered by statute, 115—117.

Larceny, 113—153.

1. *Simple larceny at common law.* Indictment for simple larceny, 113; venue, 5. 114. 127; evidence, 114—129. 63. 67; punishment, 114. Stealing swans, 116. Stealing hawks, 117. Larceny by servants, 125, 126. Larceny by a guest from an inn, 126. Horse stealing, indictment for, 127; evidence, 128; punishment, 128. Indictment for stealing sheep or cattle, 128; evidence, 128; punishment, 128.
2. *Simple larceny by statute.* Indictment for stealing lead, iron, copper, &c. attached to a building, &c. 130; evidence, 130; punishment, 130. 115. Stealing black lead or black lead ore from mines, 115. Stealing or destroying turnips, potatoes, cabbages, beans, parsnips, peas or carrots, 115. Stealing or destroying madder roots, 115. Stealing, cutting down, barking or destroying timber trees, roots, shrubs, or plants, indictment for, 129; evidence, 129. 130; punishment, 129.

—— Indictment for stealing bills of exchange, promissory notes, bank notes, bonds, warrants for the payment of money, dividend warrants, exchequer orders or tallies, exchequer bills, South Sea bonds, East India bonds, navy bills or debentures, 130; evidence, 131; punishment, 130. 116. Indictment for stealing a letter sent by the post, 131; venue, 131, 132; evidence, 132; punishment, 131.

—— Indictment for stealing deer, 132; evidence, 132; punishment, 132. 116. Stealing dogs, 116. Indictment for stealing conies, 133; evidence, 133; punishment, 133. 116. Stealing hares from a preserve, 117. Indictment for stealing fish, 134; evi-

dence, 135; punishment, 134. 117. Stealing oysters or oyster brood, 117.

3. *Compound larceny.* Indictment for stealing from the dwelling house, 135; evidence, 135, 136; punishment, 135. Indictment for stealing in a dwelling house, some person being therein and put in fear, 136; evidence, 136; punishment, 136. Indictment for privately stealing in a shop or warehouse, 136; evidence, 137; punishment, 137. Indictment for larceny from the house, by breaking into the same, 138; evidence, 139; punishment, 138. Stealing from the dwelling house, some person being therein, 138. Indictment for stealing from lodgings, 139; evidence, 140; punishment, 139. Indictment for sacrilege, 140; evidence, 141; punishment, 141. Indictment for stealing from a ship, barge, lighter, boat, &c. in a port, creek, or navigable river, 141; evidence, 141; punishment, 141. Stealing goods from a wharf or quay, 141. Indictment for stealing linen, cotton, &c. from bleaching grounds, or drying houses, 141; evidence, 142; punishment, 141. Indictment for stealing cloth or other woollen goods from the tenters or racks, 142; evidence, 143; punishment, 142.

—— Indictment for stealing from the person, 143; evidence, 143; punishment, 143.

—— Indictment for robbery, 143; evidence, 144—148; punishment, 144.

—— Indictment for stealing from a wreck, 152; evidence, 153; punishment, 153.

Larceny by a bailee, in what cases, 124. 126.

Larceny from a bailee, how stated; how proved, 177, 118.

Larceny of the property of a corporation, 118, of a mining company, 10. 118, of partners, 10. 118, of clothes, &c. provided for the poor of a parish, 119, and of materials, &c. provided for county bridges, 119; how described in the indictment, 119.

Larceny cannot be committed by a joint tenant, or tenant in common of the joint property, 120.

Larceny cannot be committed by a wife of the goods of her husband, 120.

Laws of a foreign country, how proved, 86.

Lead attached to buildings, &c. indictment for stealing, 130; evidence, 138; punishment, 130. 115. Stealing black lead, or black lead ore, from mines, 115.

Letters, sent by the post, stealing, indictment for, 131; venue, 131, 132; evidence, 132; punishment, 131.

Letters, servants of the post office embezzling, 116; or destroying, 116.

Letters patent, how proved, 82.

Letters, threatening. See "*Threatening letter.*"

Levying war, 269; direct, 269, or constructive, 269, 270. Indictment for, 268; evidence, 269, 270.

Lewdness, open and notorious, indictment for, 376; evidence, 377; punishment, 377.

Libel, blasphemous, indictment for, 294; evidence, 295; punishment, 294.

Libel, seditious, indictment for, 285. 287, 288; evidence for the prosecution, 289—292; evidence for the defendant, 292, 293. 69; punishment, 286.

Libel reflecting on the administration of justice, indictment for, 329; punishment, 330.

Libel against an individual, what, 344—346. Indictment for, 343; evi-

dence, 346; punishment, 343. Indictment for a libel upon an attorney, 347. Indictment for hanging a man in effigy, 348; evidence, 349.
Libel, general rules as to the form of an indictment for, 287—289.
Libel in the admiralty and ecclesiastical courts, how proved, 84.
Lighter. See "*Ship.*"
Limb, cutting off or disabling, 249.
Limitation of prosecutions, 32.
Linen, stealing, from bleaching grounds, indictment for, 141; evidence, 142; punishment, 142.
Local description, matter of, must be proved as laid, 14, 15. 62.
Lodgings, indictment for stealing from, 139; evidence, 140; punishment, 139.
Lords, house of. See "*Judgment.*" "*Parliament.*"
Lunatic, in what cases capable of crime, 214; in what cases incompetent as a witness, 93.

M.

Madder roots, stealing or destroying, 115.
Magistrate, information against, in what cases granted, 40. Indictment against, for committing, in a case where he had no jurisdiction, 325; evidence, 326; punishment, 326. Certificate of, as to a road being in repair, 88. Not obeying the order of, 327, 328.
Malice prepense, express, 215, 216; implied, 216—229. Must be alleged in indictments for murder, 23. How proved, 69. 290.
Malicious mischief, 182—188. Indictment for maliciously killing cattle, 182; evidence, 182; punishment, 182. Indictment for maliciously wounding cattle, 183; evidence, 182; punishment, 183. Indictment for cutting down or destroying trees growing in an avenue, garden, or plantation, for ornament, shelter, or profit, 183; evidence, 183; punishment, 183. Indictment for breaking down the head of a fish pond, 184; evidence, 184, 185; punishment, 184. Indictment for cutting down river or sea banks, 185; evidence, 185; punishment, 185. Indictment for burning, damaging, or destroying the fences of inclosed lands, 185; evidence, 186; punishment, 185; Indictment for destroying serge, or other woollen goods in the loom, 186; evidence, 186; punishment, 186. Breaking or destroying tools, &c. used in manufacturing woollen goods, &c., 186.
Manslaughter, 214—236. 238. What, 214. Involuntary, 214; voluntary, 214. Indictment for manslaughter, 238; punishment, 239. Indictment for manslaughter by stabbing, 239; evidence for the prosecution, 239, 240; evidence for the defendant, 241; punishment, 239.
Manufactures, buildings, engines, &c. used in, setting fire to or burning, 181; riotously beginning to demolish, 336.
Marriage, how proved, 87; how proved in cases of bigamy, 358, 359.
Marriage of Jews, how proved, 87.
Master may justify a battery, 243, or even killing, 219, in defence of his servant.
Mayhem. See p. 249.
Mill, burning or setting fire to, 180, 181; riotously beginning to demolish, 336.
Milled money, what, 281, 282.
Mines: stealing black lead ore from, 115. Setting fire to or burning any mine, pit, or delph of coal, 181. Riotously beginning to demolish engines, &c. belonging to collieries or mines, 336.
Mining company, larceny of the property of, how described, 10. 118.
Misadventure, homicide by, 214. Miscarriage. See "*Abortion.*"

Mischief. See "*Malicious mischief.*" 182—188.
Misconduct of officers of justice, 324; punishment, 325. Indictment against a constable for not conveying an offender to prison, 324; evidence, 325. Indictment against a magistrate for committing, in a case where he had no jurisdiction, 325; evidence, 326; punishment, 326.
Misdemeanor, venue in indictments for, 6.
Misjoinder of counts, how taken advantage of, 31.
Misjoinder of defendants, how taken advantage of, 30.
Misnomer, plea in abatement for, 47; affidavit to verify it, 47; replication to it, 47; evidence to support it, 48; judgment, 48.
Money. See "*Coin.*" "*Embezzlement.*" How stated in an indictment, 22. Variance in value of sums of money, between the statement and proof, 63, 64. 117. 146.
Moravian. See "*Affirmation.*"
Murder, 210—236; what, 214—216; punishment, 211. Indictment for murder by stabbing, 210; venue, 4, 5; evidence for the prosecution, 211; evidence for the defendant, 213—229. Indictment for murder, by shooting, 230; by throwing a stone, 230; by beating, 230; by riding over the deceased, 231; by drowning, 232; by starving, 232; by poison, 233. Indictment against a woman for murder of her bastard child, 234; evidence, 235, 236.
Murdravit, necessary in indictments for murder, 22.
Mutiny, inciting to, 298.

N.

Name of the defendant, how stated, 7; Christian name, 7; surname, 7. See "*Misnomer.*"
Name of the party injured, how stated, 9, 10; no addition necessary, 10. Variance between the statement and proof of it, 63.
Naval stores, indictment for having in his possession, 300, 301; evidence for the prosecution, 301; evidence for the defendant, 301, 302; punishment, 300.
Navy. See "*Ships.*"
Navy bills or debentures, stealing, 130, 131. 116.
Negligent escape, indictment for, 303, 304.
Newfoundland, venue in indictments for crimes committed there, 4.
Newspaper, proof of the publication, &c. of, in cases of libel, 291.
Night, what, in burglary, 165.
Nose, indictment for slitting, with intent to maim or disfigure, 249.
Notes. See "*Embezzlement.*" Stealing promissory notes, 130, 131. 116.
Notice to produce, in what cases necessary, 72.
Nuisance, 360. 376. Indictment for carrying on an offensive trade, 360; evidence, 362; punishment, 361. Indictment for keeping a common bawdy house, 362; evidence, 362, 363; punishment, 362. Indictment for keeping a common gaming house, 363; evidence, 364; punishment, 363. Indictment for obstructing a common highway, 364; evidence, 365; punishment, 365. Indictment for obstructing the navigation of a public river, 365; evidence, 365; punishment, 366. Not repairing a highway or bridge, see "*Highway.*" "*Bridge.*"
Nuisance, venue in indictments for, 5.

O.

Oath of a witness, 103. See "*Perjury.*"
Oath, unlawful, indictment for administering, 296; venue, 296; evidence, 297; punishment, 296. Indictment for taking such an oath, 297; evidence, 297; punishment, 297. Indictment for administering an oath to commit treason or felony, 297; venue, 298; punishment, 298.

Obscene prints, &c. indictment for selling, 295; evidence, 295; punishment, 295.
Obtaining goods, &c. under false pretences. See "*False Pretences.*" "*Cheating.*"
Office, refusing to execute, 383. Indictment for refusing to serve the office of chief constable, 383; evidence, 384; punishment, 384. Indictment for refusing to serve the office of petty constable, 385. Indictment for refusing to serve the office of overseer of the poor, 386; evidence, 386, 387.
Officers of justice, killing, 225—228; killing by, 228. Assaulting, in the execution of their duties, indictments for, 251, 252.
Officers of justice, in what cases informations granted against, 40. See "*Misconduct.*" Orchard. See "*Garden.*"
Order. See "*Judge's order.*" Indictment against a constable for disobeying an order of sessions, 327; evidence, 328.
Ordnance. See "*Stores.*" Ore, stealing from mines, 115.
Outhouse. See "*Dwelling house.*" "*House.*" Burning outhouses, 178, 179. 181.
Overseer of the poor, indictment for refusing to serve the office of, 386.
Overt acts of compassing the King's death, 265; of adhering to the King's enemies, 270. Ox. See "*Cattle.*"
Oysters, or oyster brood, stealing, 117.

P.

Papist. See "*Catholic.*"
Pardon, plea of, 55; in what cases, 55; where to be pleaded, 55; in what form, 55. The effect of pardon in restoring competency, 94, 95.
Parent may be witness for or against his child, 98; may commit a battery, 243, or even kill, 219, in defence of his child.
Parish poor, larceny of goods provided for, how described, 119.
Parish register, how proved, and in what cases evidence, 87.
Park. See "*Deer Park.*"
Parliament, entries in the journals of, how proved, and in what cases evidence, 82.
Parol evidence. See "*Evidence.*"
Parsnips, stealing or destroying, 115.
Partners, larceny of the property of, how described, 10. 118.
Patents, how proved, 82. Peas, stealing, 115.
Peers and peeresses, how named in an indictment, 9.
Penny. See "*Coin.*"
Perjury, 312; punishment, 313. The oath must be taken in a judicial proceeding, 313, before a competent jurisdiction, 314, deliberately and intentionally, 314, and the matter sworn must be material to the subject then in question, 314, and false, 314. False affirmation of a quaker, perjury, 313. Requisites in an indictment for perjury, 314, 315. 18. Evidence, 67. 83. 96. Indictment for perjury in an affidavit to hold to bail, 312; evidence, 315, 316. Indictment for perjury upon a trial at the assizes, 317; evidence, 318. Indictment for perjury upon a complaint before a magistrate, 318.
Perjury, subornation of, indictment for, 319; evidence, 321.
Person, stealing from the, indictment for, 143; evidence, 143; punishment, 143.
Petit larceny, how punished, 114.
Petit treason, indictment for, 234; evidence, 234.
Picking pockets, indictment for, 143.
Pictures. See "*Obscene prints.*"
Piracy at common law, indictment for, 149; evidence, 150—152; punishment, 150.

Place, how stated in indictments, 13; if stated as matter of local description. it must be proved as laid, 14, 15. 62. Variance between the statement and proof of it, in what cases material, 61. 178.
Plants, stealing, cutting down or destroying, 115.
Plea in abatement. See "*Abatement.*"
Plea in bar, 49. In what cases necessary or usual, 49. Form of it, 50. Replication to it, 50. *Similiter*, 51. Rejoinder, 51. See "*Autrefois acquit*," &c. "*Pardon.*"
Pleas, declinatory, what and in what cases, 57.
Plea to the jurisdiction. See "*Jurisdiction.*"
Poison, killing by, 216. 224. Indictment for murder by, 233. Indictment for an attempt to poison, 238; evidence, 238; punishment, 238.
Poll books of an election, how proved, 87.
Polygamy. See "*Bigamy.*" Pond. See "*Fish Pond.*"
Positive, statements in indictments, &c. must be, 26.
Post office, servants of, embezzling letters, 116. Destroying letters for which they have received postage, 116.
Potatoes, stealing or destroying, 115.
Powder. See "*Stores.*"
Practice of the ecclesiastical courts, how proved, 84.
Presumptive evidence, 77; what, 77; violent presumptions, 77; probable presumptions, 77; light or rash presumptions, 77. Cautions to be observed in admitting this evidence, 78.
Pretences. See "*False Pretences.*"
Principal felon, a competent witness against the receiver, 96. 154.
Principal in the second degree, indictment against, 395; evidence, 396. 65, 66; punishment, 395, 396.
Prints. See "*Obscene Prints.*" Prison. See "*Breach of Prison.*"
Prison books, in what cases evidence, 87.
Privy seal, counterfeiting, 275.
Probate of a will, copy of, in what cases evidence, 84.
Process against witnesses, 104.
Proclamation, how proved, and in what cases evidence, 88, 89.
Proclamation under the riot act, 335. Opposing the reading of it, 336.
Promissory note, stealing, 130, 131. 116; forging and uttering. See 197—199.
Prosecutor, a competent witness, 97. His expenses, in what cases given to him, 108.
Proviso in a statute, when to be stated in pleading, 25. How proved, 66.
Provocation, killing upon, 219; where murder, 219—221; where manslaughter, 219, 220; cannot be excusable or justifiable, 219.
Provoking a man to send a challenge, indictment for, 338, 339; evidence, 339; punishment, 339.
Publication of a libel, what, 290; how proved, 290, 291.
Purport, meaning of the term in pleading, 21. Variance after it, 65.

Q.

Quashing indictments, in what cases, 35; how, 36. Quashing informations, 38. 44.
Quaker. See "*Affirmation.*" Quay, stealing from, 141.

R.

Rabbit. See "*Conies.*"
Rabbit warren, robbing or being in, armed and disguised, 134.
Rape, 259. Indictment for ravishing a woman, 259; evidence, 259, 260. 69; punishment, 259. Indictment for carnally knowing a female under ten years of age, 260; evidence, 261; punishment, 261. Indictment for an assault with intent to commit a rape, 261; evidence, 261; punishment, 261. Indictment for an assault with in-

tent carnally to know a child under ten years of age, 261; evidence, 262; punishment, 261.
Rapuit, necessary in an indictment for rape, 22.
Realty. See "*Land.*" Receipt. See "*Forgery.*"
Receiving stolen goods, 153. Indictment for a misdemeanor in receiving stolen goods, 153; evidence, 154; punishment, 154. Indictment against the principal and receiver jointly, 154; evidence, 155; punishment, 155. Indictment against the receiver as accessary, the principal being convicted, 155; evidence, 155. Receivers of stolen goods are accessaries, 155.
Recognisances upon an information, 43.
Recognisances to appear and give evidence, 104, 105.
Records of the king's courts, how proved, 79, 80; of inferior courts, how proved, 80; of the courts in Ireland, how proved, 86. Variance between the statement and proof of matter of record, 64. 117.
Re-examination of witnesses. 112.
Register, parish, how proved, and in what cases evidence, 87.
Register of the navy, in what cases evidence, 87.
Regrating, what, 354. Indictment for, 354; evidence, 354; punishment, 354.
Rejoinder, form of, 51.
Replication to a plea to the jurisdiction, 46; to a plea of misnomer, 47; to a plea in bar, 50; to plea of *auterfois acquit*, 53.
Repugnant, statement in indictment must not be, 26.
Rescue, 309. Indictment for rescue of a felon from a constable, 309; evidence, 311; punishment, 310.
Restitution, when awarded in forcible entry, 175. 177.
Returning from transportation, indictment for, 311; venue, 311; evidence, 311; punishment, 311.
Relevant allegations, though unnecessary, must be proved, 19. 67.
Riot, 332. Indictment for a riot and assault, 332; evidence, 333, 334; punishment, 333. Indictment for a riot and tumult, 334; punishment, 334. Indictment against rioters for remaining together one hour after proclamation, 334; evidence, 336. Indictment for riotously beginning to demolish a house, church, chapel, &c. 336; evidence, 336; punishment, 336.
Rioters, killing, in what cases justifiable, 229.
River, cutting down the banks of, indictment for, 185. Indictment for obstructing the navigation of a public river, 365; evidence, 366; punishment, 366.
Robbery, indictment for, 143; evidence, 144—148. 67; punishment, 144. Indictment for an attempt to rob, 148; evidence, 149; punishment, 149.
Robbing a rabbit warren or preserve for hares, 134.
Rolls. See "*Court Rolls.*"
Roots, stealing or destroying, 115. 129.
Rules of court, how proved, and in what cases evidence, 83.
Running goods. See "*Smuggling.*"

S.

Sacrilege, indictment for, 140; evidence, 141; punishment, 141.
Sailor. See "*Allegiance.*"
Sea, what, within the jurisdiction of the admiralty, 150. Offences on, venue in indictments for, 4.
Sea banks, indictment for cutting down, 185; evidence, 185; punishment, 185. Seal. See "*Great seal.*" "*Privy seal.*"
Secondary evidence, 71.
Securities for money. See "*Embezzlement.*"

Se defendendo, battery, 243 ; homicide, 214. 218, 219.
Sedition, 285. 287. Indictment for a seditious libel, 285. 287, 288 ; evidence for the prosecution, 289—292 ; evidence for the defendant, 292, 293. Indictment for seditious words, 293 ; evidence, 294 ; punishment, 293.
Sentence in the court of admiralty, how proved, 84 ; of the ecclesiastical courts, how proved, 84.
Servants, embezzlement by, 157. Larceny by, 125, 126. Larceny from, 118. A servant may justify a battery, 243, or even homicide, 219, in defence of his master.
Sheep, indictment for stealing, 128. Indictment for killing, with intent to steal part of the carcass, 128, 129. Shilling. See "*Coin.*"
Ship, casting away or destroying, to defraud the underwriters or owners, indictment for, 187 ; evidence, 188 ; punishment, 187.
Ship, barge, lighter or boat, indictment for stealing from, 141.
Ship keel or other vessel, setting fire to, 181 ; or otherwise destroying, 187.
Ships of war, setting fire to, 181. 4.
Shooting, murder by, indictment for, 230. Indictment for shooting, with intent to murder, rob, disfigure, disable, or do some grievous bodily harm, 246 ; evidence, 246, 247 ; punishment, 246. Indictment for attempting to shoot, with like intent, 248 ; evidence, 248. Indictment on the black act, for shooting at another, 248 ; evidence, 248 ; punishment, 248.
Shooting at a ship belonging to his majesty's navy, indictment for, 351, 352 ; venue, 352 ; evidence, 352 ; punishment, 352.
Shop, indictment for stealing from, 136, *and see* 138 ; evidence, 137.
Shrubs, stealing or destroying, 115. 129.
Similiter, 48, 49. 51. Signal. See "*Smuggling.*"
Slander. See "*Libel.*" Indictment for slanderous words to a magistrate, 330 ; evidence, 331 ; punishment, 331.
Smuggling, 350. Indictment for being armed and assembled for the purpose of assisting in running uncustomed goods, &c. 350 ; venue, 352 ; evidence, 350, 351 ; punishment, 350. Indictment for assisting in the running of uncustomed goods, 351 ; evidence, 351 ; punishment, 351. Indictment for shooting at a ship belonging to his Majesty's navy, 351, 352 ; venue, 352 ; evidence, 352 ; punishment, 352. Indictment for lightening a fire on the coast, as a signal to a smuggling vessel, 352 ; evidence, 353 ; punishment, 353.
Sodomy, indictment for, 262 ; evidence, 262 ; punishment, 262. Indictment for an assault with intent to commit sodomy, 263 ; evidence, 263 ; punishment, 263. Soldier. See "*Allegiance.*"
Soliciting a man to commit an offence, indictment for, 403 ; evidence, 403 ; punishment, 403.
Son assault demesne, 243.
South sea bonds, stealing, 130, 131. 116. Sovereigns. See "*Coin.*
Special plea. See "*Abatement.*" "*Auterfois acquit, &c.*" "*Jurisdiction.*" "*Pleas in bar.*" Special venue. See "*Place.*"
Stabbing, indictment for murder by, 210—229. Indictment for manslaughter by, 239—241. Indictment for stabbing with intent to murder, rob, disfigure, disable, or do some grievous bodily harm, 246 ; evidence, 246, 247 ; punishment, 246. Stabbing to resist apprehension, 246.
Stable, stealing from, 136, 137.
Starving, murder by, indictment for, 232.
State. See "*Acts of state.*" Statement. See "*Indictment.*"
Statutes, in what cases to be proved, and how, 79. Certainty required in indictments on statutes creating offences, 23, or ousting clergy,

23. 66, 67. Proviso or exception in a statute, when to be stated in pleading, 25; how proved, 66.
Stealing. See "*Larceny.*" Stealing children, 257, 258.
Stores. Indictment for embezzling the King's stores (armour, ordnance, ammunition, shot, powder, or habiliments of war,) 299; evidence, 300; punishment. 299. Setting fire to them, 181.
Stores, naval, indictment for having in his possession, 300, 301, 302.
Straw, setting fire to, 181.
Subornation of perjury, indictment for, 319; evidence, 321.
Subpœna, 105. *Subpœna duces tecum*, 106.
Surname of defendant in an indictment, 7.
Surplusage, what may be rejected as, 16. 19. 67.
Surveys, public, 87, private, 88, how proved.
Swans, stealing, 116.

T.

Taking, what, to constitute larceny, 120; actual, 120; constructive, 120—127.
Tenant in common or joint tenant, by taking the thing in common from his co-tenant, cannot be guilty of a larceny, 120.
Tenor, implies a literal copy, 20. 64. Variance after it, 64.
Terriers, how proved, 88.
Threatening letter, 340. Indictment for sending a letter demanding money, 340; venue, 5. 340; evidence, 340, 341; punishment, 340. Indictment for sending a letter threatening to murder, or to burn houses, &c., 341, 342; evidence, 342. Indictment for sending a letter threatening to accuse the party of a crime, 342; evidence, 343; punishment, 342. Timber. See "*Stores.*"
Timber trees, stealing, cutting down, barking or destroying, 129, 130. 115.
Time, how stated, 13. How proved, 60. 178.
Tomb stone, inscription on, how proved, and in what cases evidence, 87.
Tongue, cutting out, 249.
Traitorously, requisite in an indictment for treason, 22.
Transportation, returning from, indictment for, 311; venue, 311; evidence, 311; punishment, 311.
Traverse. See "*General traverse.*"
Treason, high, 264—275. Indictment for compassing the King's death, 264; venue, 5. 4; overt acts, 265; evidence, 267, 268. 67, 68. 76. Indictment for levying war, 268; evidence, 269, 270. Indictment for adhering to the King's enemies, 270; overt acts, 271, 272; what an adhering, 271, 272; who an enemy, 272, 273; evidence, 273. Indictments for treason on stat. 36 G. 3. c. 7. s. 1, 273, 274, 275. Aiders and abettors in high treason, 270. There are no accessaries; all are principals, 398.
Treason, petit, indictment for, 234; evidence, 234. Accessaries in, 398.
Trees. Indictment for cutting down, barking, or destroying trees, shrubs, or plants, 129; evidence, 129, 130; punishment, 129. 115. Pulling up fruit trees, 115. Cutting or spoiling woods, underwood, poles, or trees standing, 115. Indictment for cutting down or destroying trees growing in an avenue, garden, or plantation, for ornament, shelter, or profit, 183; evidence, 184; punishment, 183.
Trespassers in forests, parks, chases, or warrens, &c. in what cases justifiable, 229. Tumult. See "*Riot.*"
Turnips, stealing or destroying, 115.

U.

Underwood. See "*Trees.*" Underwriter. See "*Ship.*"
Unknown person, goods of, or injury to the person of, how described in an indictment, 10; evidence to support it, 63. 117.

Unlawful oath. See "*Oath.*"
Uttering. See "*Coin.*" "*Forgery.*"

V.

Value, variance in, between indictment and proof, in what cases material, 63, 64. 117. 146.
Variance between the pleading and proof: in time, 14. 60. 178; in place, 14. 61. 178; in the name of the party injured, 11. 63; in the offence charged, 25. 62. 160; in matters of record, 21, 22. 64. 117; in written instruments, 20, 21. 64. 189. 192, 193. 288. 291. 340; (a mere literal variance, not material, 64;) in words, 21. 65. 294; as to goods, 22. 63. 114; as to value, or sums of money, 63, 64. 117. 146.
Venue, 3—6.
Violent presumptions, 77. See "*Presumptive evidence.*"
Voluntary escape, indictment for, 305, 306.
Voluntary manslaughter, 214.

W.

Wales, venue, in indictments for offences committed in, 3, 152. Certificate of the judges of, in what cases evidence, 88.
War, articles of, how proved, 89. Habiliments of. See "*Stores.*"
War, levying, 259; direct, 269; constructive, 269, 270. Indictment for levying war, 268; evidence, 269, 270.
Warehouse, larceny in, 136, 137. See 138.
Warlike stores. See "*Stores.*"
Warrant of a magistrate, arrest under, 255; arrest without, 255, 256.
Warrant for the payment of money, stealing, 116. 130, 131; forging and uttering, 200. 203.
Warren. See "*Rabbit Warren.*"
Wharf, stealing goods from, 141.
Will. See "*Forgery.*" Will of lands, how proved, 91. Copy of a probate of a will, in what cases evidence, 84.
Wife, cannot be a witness for her husband, 97; in what cases she may be a witness against him, 97, 98. She cannot be guilty of larceny, by taking the goods of her husband, 120. She may justify a battery, 243, and even a homicide, 219, in defence of her husband.
Witness. See "*Evidence.*" Two witnesses necessary in high treason, not relating to the coin or seals, 104, in petit treason, 104, and in perjury, 104; in all other cases, one witness is sufficient, 104.
Wood, setting fire to a stack of, 178. 181.
Wood. See "*Trees.*"
Woollen cloth, stealing from the tenters or rack, 142, 143. Destroying, in the loom, 186. Breaking or destroying tools, &c. used in the manufacture of, 186.
Words. See "*Sedition,*" "*Slander,*" "*Variance.*" In what cases treason, 266, 267.
Worship. See "*Disturbing.*"
Wounding. See "*Stabbing.*" Indictment for maliciously wounding cattle, 183.
Wreck, indictment for stealing from, 152; evidence, 153; punishment, 153.
Writ, how proved, 81.
Writings, in what cases treason, 266, 267. 272.
Written instrument, how stated in indictments, &c. 19. How proved, if under seal, 89; how, if not under seal, 91. See "*Variance.*"

Y.

Yarn, stealing from bleaching grounds, drying houses, &c. 141, 142.

THE END.